No. 20071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BAKER & TAYLOR DRILLING CO.,

Appellant,

vs.

R. W. STAFFORD, Trustee,

Appellee.

APPELLEE'S BRIEF.

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PRELIMINARY STATEMENT.

The Statement of Facts set forth in the brief filed by Baker & Taylor Drilling Co. (for the sake of brevity hereinafter sometimes referred to as "Baker & Taylor"), contain certain alleged facts not found by the Court to be true, and not pertinent to the issues involved herein, while certain other important and material facts are not mentioned. Certain other mentioned facts are not entirely correct and are misleading.

In our Statement of Facts, and in our reference to the pleadings, which established jurisdiction, we shall endeavor to mention those facts which are important and material in the determination of the main issues involved in this appeal.

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION IN THE BANKRUPTCY COURT.

For the convenience of the Court, and to make crystal clear what the Trustee is attempting to accomplish by this litigation, and to establish jurisdiction, we shall set forth in our Appendix No. 1 of this brief, the Trustee's Application for the relief sought therein; and as Appendix No. 2, a copy of the Order to Show Cause on which the issues herein were presented.

The within bankruptcy proceeding was originally commenced by Tri-State Petroleum Inc., in filing a petition under the provisions of Section 128 of Chapter X of the Bankruptcy Act on the 17th day of June, 1963, in the United States District Court for the District of Nevada. The petition was approved by the Court on June 24, 1963, and the Court on the last mentioned date appointed R. W. Stafford as Trustee, and said Trustee duly qualified and has at all times since continued to act as Trustee of said Estate. The Order of the Court of June 24, 1963, contained the usual provisons restraining all persons from interfering by lawsuit or otherwise with the Trustee and the debtor's property, wherever located. [See Par. XV, p. 17 of Tr. of R. re Order June 24.]

This debtor proceeding was subsequently, on motion of creditors, transferred to the United States District Court for the Southern District of California, Central Division, and this Honorable Court signed an Order on or about September 4, 1963, referring said proceeding to Ronald Walker, a Referee in Bankruptcy, and to said Referee as Special Master, to hear and report generally upon such matters as may require the judgment of the

Judge of this Honorable Court, pursuant to the provisions of Section 117 of Chapter X of the Bankruptcy Act. (We do not find in the record before this Honorable Court the Order of the District Judge dated September 4, 1963, but we shall ask the Court to augment the record by having said Order certified to the Court, unless Counsel for Appellant agrees that the Order referred to was so made.)

During the course of the administration of said estate, the Trustee found that among the properties in which the debtor corporation had an interest were certain oil and gas wells and leases, located in the County of Hansford, State of Texas, among which is a gas well located on the Southeast Quarter of Section 2, Block 1, H&GN Ry. Co. Survey, County of Hansford, State of Texas. This particular gas well is located approximately 7½ miles southeast of the City of Spearman, Texas. [R. Tr. March 24, 1964, p. 9, line 15.] Also, [R. Tr. March 24, 1964, p. 34, line 26.]

The debtor corporation became interested in these properties in the following manner:

Some time prior to May of 1962, and probably in the latter part of 1961, the predecessor of the debtor corporation, to wit, Midwest Petroleum Corporation, became interested with J. D. Amend of Amarillo, Texas, in the drilling of certain oil and gas wells in the County of Hansford, State of Texas, upon certain properties upon which J. D. Amend held leases for the drilling of oil and gas wells. [R. Tr. March 24, 1964, p. 35, line 16.] Briefly, the agreement between J. D. Amend and the debtor corporation was to the effect that if the debtor corporation would furnish the drilling costs for the drilling of these wells, which amounted to the ap-

proximate sum of $60,000.00 each, and would subsequently pay three-fourths of the costs and expenses necessary to place said wells upon production, J. D. Amend would then assign to the debtor corporation or its nominees a three-fourths interest in said oil and gas wells and leases. (See Amend letter in Appendix No. 1.)

The first of the properties drilled upon was known as "Section 56," in the County of Hansford, State of Texas, lying approximately 2 or 2½ miles southeast of the City of Spearman. [R. Tr. March 24, 1956, p. 35.]

Pursuant to the arrangement between J. D. Amend and the debtor corporation, and on or about May 24, 1962, Baker & Taylor Drilling Company of Amarillo, Texas, entered into a contract with J. D. Amend of Amarillo, Texas, for the drilling of a well for oil, gas and other petroleum products to an agreed depth on said Section 56. This drilling contract provided for a lump sum payment of $58,000.00 to be paid for the drilling of the well to the agreed depth, together with any other sums which might accrue for certain additional work referred to as "day rate compensations," if any should arise. (See Contract in Evidence.)

This contract provided that the sum payable shall be paid within thirty (30) days after completion of the drilling of the well. Performance of this work was completed on or about June 18, 1962 and payment therefor was completed on or about July 12, 1962. The drilling cost of this well was paid and advanced by the debtor corporation, [R. Tr. March 24, 1964, p. 102, line 22] and it also advanced its three-fourths interest for the payment of the other costs, pursuant to its agreement with J. D. Amend [R. Tr. March 24, 1964, p. 10].

and since there was a productive oil well on said property, J. D. Amend assigned to the debtor and debtor's nominees a three-fourths interest in said oil well and lease. The performance and payment under this contract are not here involved, except insofar as it shows a relationship between Baker & Taylor, J. D. Amend and the debtor corporation. [R. Tr. March 24, 1964, p. 10, line 4, to p. 35, line 19.]

On or about August 24, 1962, and pursuant to the original agreement between J. D. Amend and the debtor corporation, the debtor corporation this time entered into a contract for the drilling of an oil and gas well with Baker & Taylor Drilling Co. upon Section 54, Block 4-T, T&NO Survey, Hansford County, Texas. [R. Tr. March 24, 1964, beginning p. 10, line 16.] This well was to be drilled to the depth of 8200 feet from the surface, or to 100 feet in the Mississippian formation, whichever is the lesser, unless stopped at a lesser depth at the request of Tri-State Petroleum, Inc. This contract provided for the payment to Baker & Taylor Drilling Co. by Tri-State Petroleum of a lump sum of $60,000.00 for the drilling of a well to the aforementioned depth, together with any sums which might accrue for additional extra work, referred to as day rate compensation. [See B & T Ex. D.] This contract provided for $30,000.00 of the sum to be paid for the drilling, to be placed in escrow and this amount to be due at the conclusion of the drilling of the well, and the remaining sum to be due thirty (30) days after completion of the drilling of the well. The contract did not specifically provide with whom the $30,000.00 should be placed in escrow. No escrow was ever established.

However, the debtor corporation mailed to J. D. Amend its check dated August 24, 1962, payable to Baker & Taylor Drilling Co. in the sum of $30,000.00. Drilling of the well was commenced on or about August 31, 1962 and on or about September 21. 1962, Baker & Taylor received from and receipted to J. D. Amend for this check for $30,000.00. This check was deposited to the account of Baker & Taylor Drilling Co. on or about September 21, 1962 and was returned unpaid by the drawee bank, but was again deposited by Baker & Taylor on or about October 10, 1962 and paid by the drawee bank. The debtor corporation also mailed to J. D. Amend its check No. 3438 for $5,000.00, made payable to J. D. Amend and dated October 29, 1962, and endorsed by J. D. Amend to Baker & Taylor Drilling Co. to be applied upon the account of Tri-State Petroleum, Inc. for the drilling of the well on Section 54. [R. Tr. March 24, 1964, p. 45, line 20.] The third check, No. 3418 dated October 22, 1962 for $5,000.00 from Tri-State Petroleum, Inc. was mailed to J. D. Amend and payable to J. D. Amend and endorsed by him to Baker & Taylor. There were extra charges for the drilling of this well, so that the total Baker & Taylor Drilling charged and other work performed was $70,036.63. [R. Tr. March 24, 1964, p. 42, line 6.] [See Finding No. V.] Insofar as the record shows, no other monies were mailed by the debtor corporation for the payment of the drilling costs on Section 54, and there remained a balance due from Tri-State Petroleum, Inc. to Baker & Taylor Drilling Co. as shown by said Finding No. V. The drilling of the well on Section 54 resulted in a "dry hole," and no further action was taken in connection therewith.

Drilling of the Well on Section 2.

We come now to the drilling of the well which is the principal subject matter of this litigation.

On or about December 1, 1962, Baker & Taylor entered into a drilling contract with J. D. Amend for the drilling of a well for oil, gas and other petroleum products on Section 2, Block 1, H&GN Ry. Co. Survey, County of Hansford, State of Texas. This well was to be drilled to a depth of 5400 feet from the surface, or to 100 feet in the Mississippian formation, whichever is the lesser, unless J. D. Amend requested that the drilling be stopped at a lesser depth. The contract provided for payment to Baker & Taylor by J. D. Amend for a lump sum of $58,000.00 for the drilling of a well to the above depth, together with any sum which might accrue for additional or extra work, referred to as day rate compensation. The contract provided that the sum shall be payable in thirty (30) days after completion of the drilling of the well. The drilling of this well was completed on or about December 22, 1962. This particular contract provided that included in the services to be performed for the $58,000.00, one drill stem test was to be run, but provided that if J. D. Amend should elect not to have the drill stem test run, he should be credited with $800.00. Mr. Amend elected not to have the drill stem test run, so that at the completion of the well, J. D. Amend was entitled to $800.00 credit on the $58,000.00 lump sum payment provided in the contract, and no question is presented as to the exact amount which was to be paid for the drilling of this well; and no question arises about Baker & Taylor properly performing the services to be performed in the drilling of said well. [R. Tr. March 24, 1964, p. 48, line 6.]

Pursuant to the agreement between J. D. Amend and the debtor corporation, that the debtor corporation was to advance the drilling costs for the drilling of the well on Section 2 above mentioned, the debtor corporation mailed to J. D. Amend its check dated December 15, 1962 in the sum of $20,000.00, payable to Baker & Taylor Drilling Co. and marked upon the stub attached to said check "On account, Section 2, $20,000.00." J. D. Amend immediately took this check to Roy Bulls, secretary of Baker & Taylor Drilling Co., and delivered it to him. At the time of said delivery of said check to Roy Bulls, J. D. Amend stated to Mr. Bulls that Tri-State Petroleum, Inc. had agreed to pay the drilling costs for this well on Section 2. Mr. Amend further stated to Mr. Bulls at the time that he did not want to carry a further interest in this well; that he could not afford to, and that if Tri-State Petroleum did not come up with this money, that he wanted to be informed about it, as he had some other people he thought would buy this interest; Roy Bulls then and there told J. D. Amend that he would notify him as to whether or not his company received further payment; that within a few days thereafter, Roy Bulls called J. D. Amend by telephone and told Mr. Amend that his company had received the third check from Tri-State Petroleum Inc. in the sum of 20,000.00, or a total of $60,000.00. While the check of December 15, 1962 was made payable to Baker & Taylor Drilling Co., it was delivered to them through J. D. Amend. The other two checks of $20,000.00 each were mailed directly to Baker & Taylor in December of 1962 and had no statement on the checks indicating the purpose for which they were delivered. These last two checks were dated December 17th and 20th, 1962 and were in the sum of 20,000.00 each.

Notwithstanding the fact that the contract called for the payment of these drilling costs to Baker & Taylor within thirty (30) days after the completion of the well (the well having been completed on December 22, 1962) yet it is observed that all three of these payments were made prior to the completion of the well. [See quoted evidence in this brief.]

Notwithstanding the conversation between J. D. Amend and Roy Bulls, and Mr. Bulls' telephone call back to Mr. Amend that the drilling costs on this well [Section 2] had been paid, Baker & Taylor Drilling Co. proceeded to apply all of the check dated December 17, 1962 to the balance due and payable by Tri-State Petroleum, Inc. for the drilling of the well on Section 54, and applied a portion of the check dated December 20, 1962 to the payment of the balance due by Tri-State Petroleum, Inc. for the drilling of the well on Section 54, and then applied the balance of said check to the credit of the J. D. Amend contract on Section 2. In other words, the check received by J. D. Amend and delivered to Baker & Taylor Drilling Co. was all applied on the Amend contract for the well on Section 2; all of the check dated December 17 was applied upon the balance due from Tri-State Petroleum for the drilling of the well on Section 54, and the check dated December 20, 1962 was first applied to the total balance due by Tri-State Petroleum for the drilling of the well on Section 54 and then the balance thereof was applied upon the payment of the J. D. Amend contract for the drilling of the well on Section 2.

The above application of funds is emphasized for the reason that Baker & Taylor Drilling Co., in the trial before the Referee, first insisted that it would not have

known that a check from Tri-State Petroleum, Inc. was to be applied upon the drilling of the well on Section 2, because the money was not yet due. [R. Tr. March 24, 1964, p. 49, line 26; R. Tr. March 24, 1964, p. 114, line 11.] Notwithstanding this contention, it is obvious that Baker & Taylor knew enough to apply the check dated December 15, 1962 to the cost of the drilling of the well on Section 2, which contract was signed by J. D. Amend, and it also apparently knew enough to apply the balance of the last check upon the J. D. Amend account. If Baker & Taylor Drilling Co. was as innocent as it contended, why would it be applying money of Tri-State Petroleum, Inc. to the payment of a J. D. Amend obligation without first securing authority so to do?

The facts in relation to the drilling of the wells on Sections 56 and 54 above mentioned were first developed by Baker & Taylor Drilling Co.

Filing of the Application and Order to Show Cause Re Validity of Lien Claims Against the Property Located on Section 2 Above Described.

After the Trustee had investigated the estate's interest in the gas well and the lease on Section 2 above described, and the fact that there were numerous liens filed against said property, on or about the 19th day of February, 1964 the Trustee filed an Application for an Order to Show Cause seeking to determine the validity of these liens, and seeking injunctive and other relief, and for a temporary restraining order. This Application, eliminating the title of the court and cause, is marked Appendix No. 1. The Order to Show Cause issued thereon by Ronald Walker, Referee in Bankruptcy

eliminating the title of court and cause, is marked herein as Appendix No. 2.

The pleading and Order [Appendices Nos. 1 and 2]. show the exact nature of the relief which the Trustee was and is seeking.

To this Application and Order to Show Cause, J. D. Amend, in whose name the title to the property stood and who was holding said property for himself and the debtor corporation, [25% interest in J. D. Amend and 75% interest in the debtor corporation] without objecting to the jurisdiction of the Bankruptcy Court, appeared *in personam* and filed the following Answer, which eliminating the title of Court and cause, is set forth as Appendix No. 3.

Subsequently, J. D. Amend filed a supplemental to his Answer which, eliminating the title of court and cause, is marked herein as Appendix No. 4.

Beacon Supply Company, one of the lien claimants, appeared without objecting to the summary jurisdiction of the Bankruptcy Court and filed its Answer, claiming a valid lien on said property. The Special Master held that this company had a valid lien as alleged.

Baker & Taylor Drilling Co. appeared especially for the purpose of objecting to the summary jurisdiction of the Bankruptcy Court and filed such objection, and also filed an Answer in which they set forth their claimed lien.

Halliburton Company and Welex likewise appeared and objected to the summary jurisdiction of the Bankruptcy Court, and filed an Answer, claiming certain liens which were allowed and approved by the Court.

The Referee, sitting as Special Master, reserved his ruling upon the question of summary jurisdiction until all of the evidence was presented, and then overruled the objection to the summary jurisdiction and made the Findings of Fact, Conclusions of Law and Order, which are herein questioned by Baker & Taylor.

The Principal Purpose of the Trustee's Application and the Order to Show Cause Issued by the Referee-Special Master Was to Seek a Determination of the Validity and Amount of the Liens Filed and Recorded of Record Against the Oil and Gas Lease and Gas Well on Section 2 Above Described.

It is very clear that the Trustee, in filing the application herein, was among other things seeking a determination of the validity and amount of the liens filed and recorded by the respondents upon the gas well and lease on Section 2, described in the application, which was property, although standing in the name of J. D. Amend, belonged to both J. D. Amend and Tri-State Petroleum, Inc., subject only to the payment of the valid liens against same.

J. D. Amend admits in both his answer and testimony that Tri-State Petroleum, Inc. had such an interest, and that J. D. Amend was able, ready and willing to transfer such an interest to the Trustee in Bankruptcy of Tri-State Petroleum, Inc., upon its payment of three-fourths of the valid lien claims, [R. Tr. March 24-25, 1964, p. 23, line 26, to p. 24, line 3] or was agreeable to sell the property and transfer to Tri-State Petroleum, Inc. or its Trustee its three-fourths interest after the valid lien claims were paid from the sales price.

It is clear that J. D. Amend was in actual possession of, and was holding this property for the benefit of Tri-State Petroleum, Inc. and himself as per their interests at the time of the filing of the bankruptcy proceedings herein.

Furthermore, Mr. Amend has voluntarily appeared in this proceeding and has submitted himself to the summary jurisdiction of the Bankruptcy Court and is seeking substantially the same relief as the Trustee herein.

None of the three respondents who objected to the summary jurisdiction of the Bankruptcy Court were ever in the possession of the property and at no time were any of them the owners thereof. They are nothing more than lien claimants against property admittedly owned jointly by the debtor and J. D. Amend. Of course, the only respondent now complaining is Baker & Taylor.

The Trustee has never questioned the fact that Baker & Taylor performed its work in accordance with its drilling contract entered into between itself and Tri-State Petroleum, Inc. on Section 54, and that Tri-State Petroleum, Inc. owed it a balance on the account in December, 1962.

Neither is there a dispute about the proper performance by Baker & Taylor in drilling the well on Section 2 under its drilling contract with J. D. Amend.

The dispute arises over the fact that it applied funds mailed to it for the payment of the drilling costs on Section 2, [R. Tr. March 24, 25, 1964, p. 164, line 7, to p. 165, line 12] to the balance due it by Tri-State Petroleum, Inc. for the drilling work on Section 54.

Even though the two checks of $20,000.00 each which it mailed directly to Baker & Taylor had no indica-

tion on the checks themselves that the funds were to be applied upon the drilling costs of Section 2, yet Roy Bulls, secretary of Baker & Taylor was informed by J. D. Amend that Tri-State had promised to send this money for this particular purpose and requested that he be informed when it arrived, and Mr. Bulls did inform Mr. Amend that it had been received. Mr. Amend was not informed of the fact that Baker & Taylor had applied any of these funds on the old account of Tri-State Petroleum, Inc. until the following May, 1963, a period of almost five months. (See Amend testimony bottom p. 5, Appellant's Appendix 10.)

Tri-State Petroleum, Inc. had agreed with J. D. Amend to pay the drilling costs to Baker & Taylor for its three-fourth interest in the lease and well, and the President of Tri-State Petroleum, Inc. testified that the three $20,000.00 checks were mailed for this purpose, and Mr. Bulls of Baker & Taylor was so informed by Mr. Amend, and was familiar with the working arrangement between Amend and Tri-State and accepted Tri-State as a proper person to pay the obligation of J. D. Amend. (See Cited Testimony of Both Amend and Bulls.)

Appellant in its brief under the heading "Argument" on Page 47, contends:

> "The Trustee, by his agents, claimed the debtor to be entitled to only 20½% of the well and lease involved. He listed 66% interest owed by others, including 25% by J. D. Amend."

This statement of counsel for Appellant is based upon a report filed by the Trustee on the 9th day of August, 1963, long before he knew the true facts of the case,

and which was not offered in evidence or called to the Special Master's attention at the time of the hearing herein, and not found by the Special Master to be true. [See Findings of the Special Master Numbers VIII and XIX, Conclusions of Law, and Order.]

It should be explained, however, that percents in this gas well were sold by the debtor, but the purchases of these percents elected to file claims in this Chapter X proceeding instead of demanding their percents under the rule of law announced by this Honorable Court in *Woods et al. v. Deck,* 112 F. 2d 739, and objections to said claims have been overruled by the Special Master and his report thereon to the District Judge recommending the allowance of the claims is pending as this is being written. This leaves the Trustee with the exact three-fourths interest, as set forth in Amend's letter of February 11, 1963, set forth in Appellant's brief as Appendix, Exhibit 7.

Should there be any question about the correctness of the record on this point at the time of argument, the Trustee will move to augment the record on appeal by producing proof of the above by a certification of this part of the Referee's record.

ARGUMENT.

Exclusive Jurisdiction of the Debtor and Its Property, Wherever Located.

Section 111 of Chapter X reads:

> "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

In Volume 6, Collier on Bankruptcy, 14th Ed., at pages 571, 572 and 573, it is said:

> "Former §77B(a) contained a sentence couched in somewhat similar language, but it was rather vaguely worded so that there was some difference of opinion as to when jurisdiction attached. Present §111 is stated in such fashion as to remove any doubt that the jurisdiction conferred devolves upon the court at the time the petition for reorganization is filed.
>
> The broad grant of jurisdiction to the reorganization court by §111 is an essential element in the statutory scheme. Yet, as we shall see more clearly in subsequent discussions, it does not present any novel concept. The jurisdiction of the federal district courts sitting in bankruptcy is limited to matters conferred by statute or implied therefrom. In ordinary bankruptcy proceedings, once the petition is filed, the district courts as courts of bankruptcy are vested by Section 2 of the Act with exclusive and paramount jurisdiction—within the limits fixed by the Act—to administer the bankrupt's estate wherever located, *to determine all liens and claims*

pertaining thereto, and to prevent by proper orders the doing of anything that will at any stage of the proceedings, tend to embarrass or interfere with the court in the administration and distribution of that estate. The district court sitting in reorganization proceedings is a court of bankruptcy. Moreover, §§112 and 114 expressly give the court in reorganization proceedings the jurisdiction and powers of a bankruptcy court both before and after the approval of a reorganization petition.

Hence, in a general way §111 seems repetitious of existing power, but this is not wholly so. In order to insure that no break might be found in the statutory framework, an express grant of authority gives special emphasis to the reorganization court's special power. More important, the provision, occurring as it does, within the precincts of Chapter X, warrants a construction of the language in keeping with the context of the chapter. And accordingly a broader significance results, consonant with the wider scope of the reorganization proceeding. Thus we shall discover that the reorganization court may bring its authority to bear upon creditors in situations not possible in ordinary bankruptcy. And the words 'wherever located', construed in the light of the purposes of Chapter X, *permit the process of the reorganization court, in giving effect to its summary powers over the estate, to run outside the state where the court sits, a result not permissible in ordinary bankruptcy where ancillary proceedings are necessary to implement the court's jurisdiction in such cases. The essential purpose remains: to render the authority*

and control of the reorganization tribunal paramount and all-embracing to the extent required to achieve the ends contemplated by Chapter X; and to exclude any interference by the acts of others or by proceedings in other courts where such activities or proceedings tend to hinder the progress of reorganization.

It should be borne in mind, however, that §111 does not stand alone, and there is no necessity to stretch the words of the section to the utmost limits to attain the result desired. Such a course perhaps was compelled under §77B, where the jurisdictional provisions were not complete, and language in many of the older cases construing that section should be read in this light. Under Chapter X, on the other hand, in addition to the provisions of §§112 and 114, previously mentioned, §113 gives the courts broad power to grant temporary stays prior to approval of the petition; §115 authorizes the court to exercise all powers of an equity receivership court, once the petition is approved; and §116 confers upon the court, after the petition is approved, various express powers, including, in addition to the power to issue stays under §11 of the Act, the power to enjoin or stay until final decree the commencement or continuation of suits against the debtor or its trustee or any act or proceeding to enforce a lien upon the debtor's property. Section 148 provides that the approval of the petition in itself shall, until otherwise ordered by the judge, operate as a stay of prior pending bankruptcy, foreclosure or equity proceedings, and of any act or other proceeding to enforce a lien against the debtor's property. Sec-

tions 256 and 257 further insure that the court may compel the surrender of property held by a receiver or trustee in a prior pending mortgage foreclosure or equity proceeding, or held by a trustee under a trust deed, or a mortgagee under a mortgage. All of these express powers, then, make it unnecessary in many instances to rely on the general terms of §111, except, perhaps, to reinforce the specific grants. If this is remembered many difficulties of construction will be avoided." (Emphasis ours.)

Volume 6, Collier on Bankruptcy, 14th Ed., at page 574 quotes from Senate Report No. 1912, wherein it is said:

"Section 111, which is an amendment of Section 77B(a), gives to the court exclusive jurisdiction over the debtor and its property, wherever located, from the time of the filing of a petition under this chapter. More effective and orderly procedure is provided by thus eliminating the doubts which presently exist under Section 77B as to the nature and extent of the court's jurisdiction before the entry of an order approving a petition."

In holding that all property which the debtor has, *or may claim an interest,* passes under the control of the Bankruptcy Court, the Court in *In re Cuyahoga Finance Co.*, 136 F. 2d 18 at 20, says:

"The vital question on this appeal is whether the jurisdiction of the court ceases after restraining a pledgee creditor from disposing of the pledged assets in his possession without the consent of the court or whether such jurisdiction extends to de-

termine setoffs of the debtor without the consent of the creditor. It is settled law that upon the filing of a petition under Chapter X of the Bankruptcy Act, all property in which the debtor has, or may claim, an interest passes under the control of the Bankruptcy Court, and upon approval of the petition, title vests in the trustee or the debtor in possession as of the date of the filing of the petition. 11 U.S.C.A. §557, 52 Stat. 888; *Cross v. Irving Trust Company*, 289 U.S. 342, 344, 53 S.Ct. 605, 77 L.Ed. 1243, 90 A.L.R. 1215; *Isaacs v. Hobbs Tie and Timber Company*, 282 U.S. 734, 737, 51 S. Ct. 270, 75 L.Ed. 645. The jurisdiction of the court is not limited to the administration of the property which admittedly belongs to the debtor, but also extends to the determination of the question of title. *Ex Parte Baldwin*, 291 U.S. 610, 54 S.Ct. 551, 78 L.Ed. 1020. To this end the Bankruptcy Court may enjoin creditors collaterally secured from selling or disposing of such collateral without the consent of the court and may make all orders necessary to prevent hindrance or delay in the preparation and consummation of the plan of reorganization. *Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & P. Railway*, 294 U. S. 648, 676, 55 S. Ct. 595, 79 L. Ed. 1110."

In a case decided prior to the enactment of Chapter X, and in passing upon the extended jurisdictional powers of the Bankruptcy Court under the provisions of Sections 77A and 77B, it is said:

"Our conclusions are that the jurisdiction of the bankruptcy court in proceedings under 77B has been extended by Sections 77A and 77B so that it

includes all of the property of the debtor, wherever located, even if such property is in the possession of a lienholder, and even if such possession has continued for more than four months prior to the initial petition of the debtor under Section 77B; and that the trial court had jurisdiction to entertain the petition here in controversy; and in the exercise of its discretion, to grant or deny the prayer of said petition upon the merits thereof."

Grand Boulevard Inv. Co. v. Strauss, 78 F. 2d 180, at 185.

As to the nature of the court's exclusive jurisdiction and the summary jurisdiction, see Vol. 6, Collier, 14th Ed., beginning at pages 576 to 595.

A litigant otherwise entitled to object to the summary jurisdiction of the bankruptcy court may consent to the summary jurisdiction, just as J. D. Amend has done, thereby giving the bankruptcy court jurisdictional power to summarily determine the issues involved. See Vol. 6, Collier, 14th Ed., pages 595 to 598, and citations thereunder.

At page 595 of the above citation it is pointed out that prior to the enactment of Chapter X in 1938, the court had summary jurisdiction under Section 77B where consent was given by the litigant who could have otherwise demanded a plenary suit, and after calling attention to the fact that Chapter X of 1938 expressly made Section 23 of the Bankruptcy Act inapplicable in reorganization proceedings, says that Section 2A(6) and (7) gives the court this power. See page 596 of the above citation.

If J. D. Amend, who had possession and control of the property in question for himself and as agent for the debtor, had contested the right of the debtor to this property and had objected to the summary jurisdiction of the bankruptcy court to hear and determine the issues, an entirely different, although not fatal, question would be before the Court. But instead of J. D. Amend objecting, he is consenting to the summary jurisdiction of the Bankruptcy Court and conceding that the bankrupt does have a substantial interest in this property, which it has partly paid for by paying Baker & Taylor $60,000.00 for drilling this gas well, and Amend requests the Court to determine this interest.

While it is conceded by the Trustee that J. D. Amend signed the drilling contract with Baker & Taylor to drill this well and thereby became liable for the amount due under the drilling contract, yet the evidence shows that J. D. Amend took the $20,000.00 check of Tri-State of December 15, 1962, which was payable to Baker & Taylor Drilling Co. and earmarked for the drilling on Section 2, handed it to the Secretary of the company, Roy Bulls, and told him in effect that he had made an agreement with Tri-State to pay this drilling cost for an interest in this property, and if Tri-State failed to send these payments (payments on the Section 2 contract) that he wanted to know about it, because he thought he had someone else whom he could sell it to. Within a few days Roy Bulls, the Secretary, called J. D. Amend and told him that the company had received the three $20,000.00 checks, or $60,000.00, which statement lulled Mr. Amend into a sense of security and according to the uncontradacted testimony of Amend, he was not informed that Baker & Taylor

had applied a portion of this $60,000.00 to an old indebtedness of Tri-State for the drilling of the well on Section 54 until the following May. (See testimony of J. D. Amend hereinafter quoted.)

The fact that Baker & Taylor knew of the agreement between J. D. Amend and debtor is apparent for the reason that the first (December 15th) $20,000.00 check from Tri-State was applied upon the Section 2 Amend account, and when Baker & Taylor found a surplus of $9,963.37 from the December 20th check of Tri-State, after paying the old account of Tri-State in full, it without further authority or question applied this balance upon the J. D. Amend account for the drilling of the Section 2 well. Certainly Baker & Taylor would not have been using this money of Tri-State to pay a debt of J. D. Amend unless it had been previously told so to do, knew all about the transaction, and approved of the Amend-Tri-State agreement. It also knew that this same agreement had prevailed between Amend and Tri-State on the two previously drilled wells, and that Tri-State had paid the drilling costs. (See testimony of J. D. Amend and Roy Bulls, Appendices 10 and 11, Appellant's brief, and testimony hereinafter set out in Appellee's brief.)

Inasmuch as some of the Tri-State checks previously given to it for prior drilling had bounced (the $30,000.00 check) it realized that the credit of J. D. Amend was better, and that it had better try and settle the Tri-State account while it could. It just might possibly get away with it.

Baker & Taylor, whose only claim is that of a secured creditor upon property admittedly belonging in part to the estate, has no standing to object to the summary ju-

risdiction of the Bankruptcy Court's determination of the amount and validity of its secured claim. It is not an adverse claimant, holding property adversely to Tri-State. Amend is not an adverse claimant to Tri-State, because he admits Tri-State's interest, and also consents to summary jurisdiction.

We have heretofore, on pages 16-19 of this brief quoted from Vol. 6 Collier, 14th Ed., pp. 571, 572 and 573, and we have italicized on pages 17-18 of this brief the statement to the effect that after the filing of the petition in bankruptcy, district courts, as courts of bankruptcy, are vested by Section 2 of the Act with exclusive and paramount jurisdiction—within the limits fixed by the Act—(and the limit fixed by the Act under Chapter X is property of the debtor, wherever located) to administer the bankrupt's estate wherever located, *to determine all liens and claims pertaining thereto, etc.*

Bankruptcy Courts are constantly passing upon the amount and validity of lien claims of all kind upon the properties of bankrupts in both straight bankruptcies and Chapter X proceedings, liens upon both real and personal property.

Vol. 1, Collier on Bankruptcy, p. 257, No. 2.46 and citations thereunder;

In re Greyling Realty Corp., 74 F. 2d 734;

Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Chicago R.I. & P. Ry. Co., et al., 294 U.S. 648, 55 S. Ct. 595;

In re Cuyahoga Finance Co., et al., 136 F. 2d 18;

Ex parte Baldwin, et al., 291 U.S. 610, 54 S. Ct. 551;

Clark Bros. Co. v. Portex Oil Co., et al., 113 F. 2d 45 (9th C.C.);

Heffron v. Western Loan & Bldg. Co., 84 F. 2d 301 (9th C.C.);

Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734, 51 S. Ct. 270.

Also:

Miller v. Sulmeyer, 263 F. 2d 513;

Moore v. Bay, 248 U.S. 4, 52 S. Ct. 3;

Markwell & Co. v. Lynch, 114 F. 2d 373;

Jubas v. Sampsell, 185 F. 2d 333;

Woodruff v. Laugharn, 50 F. 2d 532;

In re Bowers, 33 F. Supp. 965.

The Bankruptcy Court Had Summary Jurisdiction to Determine the Questions of the Validity and Amount of Valid Liens Standing of Record Against Its Property, Wherever Located.

We fail to see how one can escape the conclusion that the Bankruptcy Court, in a Chapter X proceeding, has unquestioned summary jurisdiction in this Chapter X proceeding, under the broad powers granted by Congress in such cases, to determine the amount and validity of all liens of record against the property, wherever located, in which the debtor admittedly owns and claims a substantial interest.

Debtor had paid to Baker & Taylor $60,000.00 to cover the drilling costs of the gas well, which under the agree-

ment between Amend and the debtor, was a substantial part of the consideration to Amend for a three-fourths interest in this well and lease. The debtor therefore had the right to question the validity of the Baker & Taylor lien and claim, which it had paid with its checks and funds for the very purpose of acquiring an interest in this property.

J. D. Amend had informed Baker & Taylor, through its secretary, Roy Bulls, of the fact that the debtor was paying the drilling costs on Section 2 to acquire this interest, and Baker & Taylor accepted Tri-State Petroleum's checks for this purpose; so the right of the Bankruptcy Court in a Chapter X proceeding to determine the validity and amount of the Baker & Taylor lien and claim against property in which debtor claimed an interest, seems to be abundantly supported by the authorities upon this question.

We respectfully submit that the only person who has a right to dispute or concede a property right in this gas well and lease would be J. D. Amend, and he admits and recognizes Tri-State's interest therein, and it is a property interest within the purview of Section 70a of the Bankruptcy Act, notwithstanding the fact that the lease is still held in the name of J. D. Amend. Furthermore, both Collier on Bankruptcy and the courts emphasize that property which the debtor has *or may claim an interest in* passes under the control of the Bankruptcy Court in Chapter X proceedings.

See:

In re Cuyahoga Finance Co., 136 F. 2d 18 at p. 20.

Jurisdiction as to the Subject Matter and the Person of Baker & Taylor Drilling Company.

The subject matter here, insofar as Baker & Taylor is concerned, is the validity and amount of its claimed lien, which it filed of record against property in which the debtor admittedly has an interest. The filing of this lien by Baker & Taylor upon a property in which the debtor claims and has an interest, gives the Bankruptcy Court jurisdiction under Section 2 of the Bankruptcy Act and Sections 111, 114, 115 and 116 of Chapter X of the Bankruptcy Act, not only to determine the amount and validity of this lien, but to take such other steps and to make such orders by way of injunction or otherwise to protect the Trustee and the bankruptcy estate against unwarranted attacks, which would embarrass the Court or the Trustee in the proper administration of this estate, and in perfecting a Plan of Reorganization. Baker & Taylor, by the recording of this lien upon which the bankruptcy estate has and claims an interest, placed itself in a position where the lien is subject to attack by the Trustee in this Chapter X proceeding. The fact that Baker & Taylor Drilling Co. has its offices and does its business in the State of Texas has no bearing upon the situation in a Chapter X proceeding, even though the property is also located in the State of Texas.

Summary Jurisdiction to Determine Rights as Between Baker & Taylor Drilling Co. and J. D. Amend, and, Summary Jurisdiction to Enjoin Actions by Baker & Taylor Drilling Co. Against J. D. Amend.

The above two points will be presented as one. We concede that the Bankruptcy Court would not have jurisdiction over a dispute between Baker & Taylor and J. D. Amend, where Tri-State Petroleum, Inc. or its property or property rights were not so involved and adversely affected. We also recoginze that the question of summary jurisdiction in such cases presents a question of law more difficult of solution than the mere question of the right of summary jurisdiction over Baker & Taylor where they have filed a lien against property in which the debtor has a substantial interest.

However, the Bankruptcy Court is not impotent to protect its judgments against persons who are involved in a proceeding out of which the bankruptcy judgment arose and who, if permitted to litigate the same matter in another court, might possibly secure a judgment which might and could be the means of impressing a lien or a cloud upon debtor's property and thereby impede or embarrass the proper administration of the bankruptcy estate and the perfection of a Plan of Reorganization. It is obvious that such a lien obtained against J. D. Amend and filed of record in such litigation would adversely affect, impede and embarrass the proper administration of the bankruptcy estate, just as much as if the lien were directly against the debtor itself. The securing of a new lien based upon the non-payment of the drilling costs against J. D. Amend would place the bankruptcy estate right back where it found itself before

the hearing in the Bankruptcy Court and would render wholly ineffective the judgment rendered herein decreeing that Baker & Taylor has no lien. It would be much like clipping a blade of grass for it to grow again. The obligation of the debtor corporation to Mr. Amend to pay the drilling costs would be revived notwithstanding the fact that Baker & Taylor had received Tri-State's checks to pay this cost with full knowledge at the time of the purposes and reason for which these checks were issued.

A State Court judgment against J. D. Amend in this case would more directly and effectively affect the rights of the debtor than it would J. D. Amend, because one of the conditions and considerations of the debtor acquiring full title to this property is its payment of the drilling costs. If Baker & Taylor were permitted to go into state court and were so fortunate as to obtain a judgment against J. D. Amend for a portion of the drilling costs, then J. D. Amend would be justified in demanding of Tri-State Petroleum, Inc. the payment of such a judgment before he delivered title to three-fourths interest in the gas well, notwithstanding the fact that it has already paid the $60,000.00 for this very purpose. So in view of this situation, Tri-State Petroleum, Inc. has a far greater interest in such a suit than J. D. Amend. It is also interested in seeing that further liens are not filed against the property. In either situation the progress of this plan of reorganization and the proper administration of the estate would be impeded and embarrassed and the judgment of the Bankruptcy Court would be wholly ineffective.

This is the very thing of which Collier on Bankruptcy, above cited, speaks when it says that the Bankruptcy

Court may determine all liens and claims pertaining to the property, and has power to prevent by proper order the doing of anything that will at any stage of the proceedings, tend to embarrass or interfere with the Court in the administration and distribution of the estate.

It must be remembered that before any drilling by Baker & Taylor was commenced upon the property in question, J. D. Amend, who held the lease and drilling rights on Sections 56, 54 and 2, entered into an oral contract with the debtor corporation whereby the debtor corporation would acquire a three-fourths interest in each of the properties where wells were drilled, 1st, by the payment of the drilling costs which, on each of the wells, were approximately $60,000.00; and 2d, By paying three-fourths of the costs and expenses necessary to place the wells upon production. That Baker & Taylor knew of this arrangement is obvious from the facts that it did the drilling of each of these three wells and accepted debtor's checks therefor: it executed a drilling contract upon Section 56 with J. D. Amend, *upon Section 54 with Tri-State Petroleum, Inc.*, and upon Section 2 with J. D. Amend. Yet it was Tri-State's checks or money which, in each instance, paid the drilling cost to Baker & Taylor for each well. It was a joint Venture undertaking between J. D. Amend and debtor and Baker & Taylor knew it.

And in this connection the cross-examination of G. D. Bowie, Jr., Treasurer of Baker & Taylor Drilling Co., at page 48, Reporter's Transcript of July 1st and 2, 1964, is interesting and enlightening where, at page 51, line 5, Mr. Bowie said:

> "A. Like I said, the accounts are *synonymous* and the checks were interchanged between the two

companies, and it is very difficult for the bookkeeper to determine where they should go." (Emphasis ours.)

Mr. Bowie, at page 49, line 19, Reporter's Transcript, also testified:

"A. When the check is received, my bookkeeper saw it was from Tri-State and she gave it to the Tri-State account. Analysis later indicated that she made the wrong application."

In each instance where Baker & Taylor and J. D. Amend were involved, Tri-State was also involved, in that it was acquiring an interest in each of the wells drilled by the payment of Baker & Taylor's drilling costs.

Because of evidence such as the above, because of the way in which the last $20,000.00 check was divided between the account of J. D. Amend and that of Tri-State, and because of the conversations between J. D. Amend and Roy Bulls, Secretary of Baker & Taylor, as testified to by J. D. Amend, whose testimony the Special Master found to be true, and based upon the testimony that Roy Bulls called J. D. Amend and told him that his company had received the three $20,000.00 checks, the Special Master came to the conclusion that Baker & Taylor were informed of and knew the purpose for which the three $20,000.00 checks were mailed, and that Baker & Taylor were in effect told at or about the time the checks were received to apply same upon the Section 2 account in the name of J. D. Amend, and that the call from Bulls to Amend that the full $60,000.00 had been received from Tri-State estopped Baker & Taylor from later claiming otherwise.

The three $20,000.00 checks were mailed to J. D. Amend and to Baker & Taylor by Tri-State for the pur-

chase from J. D. Amend of an interest in the gas well pursuant to an agreement of purchase. While these checks were intended to pay an obligation which J. D. Amend owed Baker & Taylor, they were the consideration to J. D. Amend for an interest in the gas well, and it is obvious from all the evidence, including such reasonable inferences as can be drawn therefrom, that Baker & Taylor knew this, and sanctioned and agreed to such arrangement, at least by its conduct in accepting Tri-State's money for J. D. Amend's debt.

Now, if as held by the Special Master, this debt has been paid in full, then it is obvious that Baker & Taylor has no lien claim growing out of the drilling of the well on Section 2 which it can assert against this property which belongs to J. D. Amend and Tri-State, as per the Special Master's ruling.

If Baker & Taylor were permitted to pursue J. D. Amend in an attempt either to enforce its claimed lien or for a money judgment in another court, such action would vitally and adversely affect the rights of the debtor estate, in that a lien against the property by way of a foreclosure or judgment lien would be a lien against the whole of the property, and embarrass and interfere with the proper administration of the debtor estate.

The Bankruptcy Court would in such circumstances have power to stay, by injunction, an action by Baker & Taylor in a state court, upon the same subject matter, in an attempt to obtain a judgment against J. D. Amend different from that rendered in the Bankruptcy Court, because such a judgment would leave the bankruptcy court judgment open to attack and change in a way which would be detrimental to and would frustrate and

impede the proper administration of the bankruptcy estate.

Counsel for Baker & Taylor has quoted from 28 U.S.C.A., Section 2283, at page 25 of his brief, which in effect says that a court of the United States may where necessary in aid of its jurisdiction, or to protect or effectuate "its judgments" stay a proceeding in another court.

We have not examined the above section closely to determine whether it is applicable to a Bankruptcy Court, but we do know that the same rule applies to Bankruptcy Courts. Otherwise, Bankruptcy Courts would be impotent to protect their judgments.

Transaction and Controversy Between J. D. Amend and Baker & Taylor.

We cannot agree with counsel's statement in its brief to the effect that the controversy as between J. D. Amend and Baker & Taylor Drilling Co. is not involved and is wholly unrelated to the issues involved in this bankruptcy proceeding.

We contend that the entire transaction out of which Baker & Taylor's claimed indebtedness arose was a three-party transaction, in which Tri-State was a party, and Tri-State more than ever became an involved party when Baker & Taylor placed a lien upon property in which Tri-State admittedly held and still holds an interest. This is true notwithstanding the fact that the lien claim was asserted against J. D. Amend. It nevertheless became a lien and a cloud upon debtor's property, and it happened to arise from an obligation of Amend which Tri-State had agreed to pay and which, in fact, it had paid.

The Bankruptcy Court, because of Tri-State's interest in this property, had the jurisdictional power under the provisions of Chapter X of the Act to determine the validity and amount of all liens against this property because such a claimed lien adversely affected the rights of the debtor as much, if not more, than it did the rights of Amend, because if Tri-State had failed to pay Baker & Taylor the drilling costs on Section 2 as it had agreed with Amend to do as a part of the consideration for the three-fourths interest in the well, Amend was and is still in a position to hold it to the agreement of purchase.

Since, however, a lien claim was filed and recorded against the property of debtor after Baker & Taylor had accepted the debtor's money to pay this obligation with full knowledge of the agreement between Amend and the debtor, and the Bankruptcy Court has the power to prevent, by proper order, the adverse effect of such a judgment, and to prevent debtor's property and rights to again become involved by any suits which Baker & Taylor might attempt, and in fact are attempting against J. D. Amend.

The above demonstrates what we mean when we say that the Bankruptcy Court is not impotent to protect and effectuate its judgments by injunction, as well as protecting the estate's interest in the property.

Question of Estoppel.

We agree that J. D. Amend signed the contract with Baker & Taylor to drill the well on Section 2 and thereby became primarily liable to pay the drilling costs, and had a right to direct the application of payments on the account. We contend, however, that he had this right re-

gardless of whether or not the payments came directly from him or from another who was obligated to Amend to make these payments, and especially so, where Baker & Taylor was advised of the arrangement and approved of the same by its acceptance of checks from such obligor to Amend.

As we have heretofore stated, when J. D. Amend received the check dated December 15, 1962 for $20,000.00 around the middle of December, 1962 which was made payable to Baker & Taylor Drilling Company and earmarked by a statement on the stub of the check showing that it was intended to be applied upon Section 2 drilling costs, he took this check to Roy Bulls and informed Roy Bulls of his agreement with Tri-State to pay the drilling costs for an interest in the well, delivered the $20,000.00 check to Bulls; told him that he didn't want to carry a further interest in this well, that he couldn't afford to, and if Tri-State didn't come up with the money he wanted to know about it; that he had some other people he thought would buy the interest; that he later had a telephone conversation with Bulls and Bulls said that he had received the third check in the amount of $20,000.00, or a total of $60,000.00.

See Reporter's Transcript of March 24 and 25, 1964, at pages 14 to 20, where J. D. Amend testified:

> "Q. And who signed the contract with Baker & Taylor for the drilling of that well? A. I did. Let me correct that a little bit. I entered into the contract with Baker & Taylor but I'm not sure whether I ever signed the contract or not. But I did enter into a contract with Baker & Taylor to drill that well, and the well was drilled.

Q. By the Special Master: Was there a written contract? A. Yes, there was, but my signature is not on the copy I have.

Q. By Mr. Utley: You are not fighting liability on that? A. No, I am not. I rather think my signature is on the other one. I was trying to establish liability. I did enter into that contract.

The Special Master: Well, the contract itself hasn't any evidentiary value if counsel will stipulate to it.

Mr. Utley: I think the contract is already in evidence, is it not?

The Witness: Yes, it is.

Q. By Mr. Utley: When was the drilling of this well commenced on Section 2? To refresh your memory, it was December 2nd, was it not?

A. Section 2, yes, December 2nd.

Q. And when was it completed? A. About 22nd, as I remember it.

Q. What were the approximate drilling costs costs on the well on Section 2? A. The cost was $58,200.00, or $57,200.00, I don't know which, one or the other.

Q. During the month of December, did you receive a check from Tri-State Petroleum? A. Yes, I did.

Q. On or about what day, do you know? A. It was about the middle of December.

Q. And was that check made payable to you or to someone else? A. It was made payable to Baker & Taylor Drilling Company.

Q. And what did you do with that check? A. I took it to Baker & Taylor and turned it over to Baker & Taylor.

Q. Who in Baker & Taylor's office did you turn it over to? A. I turned that check over to Roy Bulls.

Q. And who is Roy Bulls? A. He is connected with the company, I believe probably as a vice-president. But he is one of the officials of the company.

Q. Do you know whether or not this is the check you turned over to him (indicating)? I am referring to check No. 00142 drawn on the Greenfield State Bank by Tri-State Petroleum, Inc., and signed by Mr. Buntin and Mr. Schlittler, and payable to Baker & Taylor in the sum of $20,000.00. A. Now, there are three of these checks, and the dates on these checks are close together, and I did take one of these checks and turn it over to Baker & Taylor; but as to which one I did, I can't definitely say. I don't recognize which one it was.

Q. Was there a stub on the one you turned over? A. I'm not sure about it.

Mr. Utley: Let's open that deposition.

The Special Master: All right.

Mr. Berry: It will be Exhibit 13, Mr. Utley.

The Witness: I will say this, I believe that there was a stub on that and it was marked 'Section 2,' but—

Q. By Mr. Utley: I hand you Exhibit 13 of the deposition, which is a photostat of a check dated December 15, 1962, for $20,000.00, payable to Baker & Taylor Drilling Company, drawn on the Greenfield State Bank, $20,000.00, and the stub says, 'On account Section 2 $20,000.00.' A. Yes, I attested to that and I said I believed that was the check I turned over to Baker & Taylor.

Q. Now, at the itme you turned that check over to Mr. Bulls, or Baker & Taylor, did you have any conversation about the payment of the drilling costs by Tri-State? A. Yes, I did.

Q. And was anyone else present other than you and Mr. Bulls, at the time? A. No, I believe not.

Q. And where was the conversation held? A. It was in the office of Baker & Taylor Drilling Company.

Q. And what was that conversation? Will you relate it? A. We were both aware of some of these checks that hadn't been paid, from Tri-State.

Q. You mean some had bounced? A. Yes; and and I told Roy, that is Roy Bulls, that I didn't want to carry a further interest in this well, I couldn't afford to, and that if Tri-State didn't come up with the money, or Mr. Schlittler or whoever was supposed to furnish the checks, that I wanted to know about it, that I had some other people I thought would buy my interest.

Q. Did you tell him how much they were supposed to pay? A. Yes, I did.

Q. What did you tell him? A. $60,000.00; and he told me that he would notify me as to whether he got the checks or not.

Q. Did you later have a conversation with him? A. Yes, I did.

Q. And was it personally or by telephone? A. It was by telephone. He called me and told me that he had received the third check in the amount of $20,000.00, or a total of $60,000.00.

Q. Now, I am going to show you—

The Special Master: Shall we take these one at a time? You haven't got the first check or the stub in yet.

Mr. Utley: Well, we do not have the attachment of the stub; but they are in evidence.

The Witness: They are all in evidence.

The Special Master: The check will be received, No. 00142, for $20,000.00, drawn on the Greenfield State Bank by Tri-State Petroleum, Inc., payable to Baker & Taylor Drilling Company, Exhibit 5; and Exhibit 13 attached to the deposition will be marked as Trustee's Exhibit 6 by reference to the deposition.

Q. By Mr. Utley: Now, I am going to show you a check dated December 17, 1962, in the sum of $20,000.00, payable to Baker & Taylor Drilling Company, signed by Tri-State Petroleum, Inc., by Mr. Schlittler and Mr. Buntin, drawn on the Greenfield State Bank. It appears to have been paid on 12-18-62. Have you seen that check before? A. No, I haven't. I have seen a photostat of that, but I haven't seen that check.

Q. You didn't personally handle that check? A. No, sir.

Q. If it was mailed, it was mailed direct to Baker & Taylor and not through you? A. No. I can say definitely I didn't handle it, and I believe the other one was the one I handled.

Q. Here is check 00156, drawn on the same bank, signed by the same parties, payable to Baker & Taylor. Did you personally handle that check? A. I believe not, no. I believe the status would be the same as on the other check that was sent direct.

Mr. Utley: Do you have any objection to offering the originals in evidence? The photostats are in, but I thought we might as well have the originals in.

Mr. Berry: No objection.

Mr. Utley: I would like to offer them, Your Honor, as exhibits next in order.

The Special Master: The check 127, dated December 17th, will be Trustee's Exhibit 7, and check No. 156 dated December 20th will be No. 8.

Q. By Mr. Utley: Mr. Amend, was there any particular reason why you told Mr. Bulls if this $60,000.00 was not paid you wanted to know about it? A. Yes, there was. As I just stated, I wanted to do something else with this—

Mr. Berry: If it please the court, I didn't understand that to be a question as to what he told Mr. Bulls.

Mr. Utley: Well, I think he has answered the question.

Q. Now, did you tell Mr. Bulls what the reason was? A. Yes, I told him.

Q. What did you tell him?

The Special Master: Just state the conversation between yourself and Mr. Bulls.

The Witness: I told him this, that I didn't want to carry that interest myself, and unless it was paid off by these people that I wanted to sell the interest elsewhere.

Q. By Mr. Utley: And then is when he told you he would let you know if the checks— A. He agreed to let me know if and when he received the checks.

Q. If he had informed you contrary to the fact that the $60,000.00 had been paid, did you have another place to sell that interest?

Mr. Berry: This is immaterial, please the court.

The Special Master: Sustained."

It is our contention that the only reasonable inference which can be drawn from the above testimony is that Amend told Roy Bulls, who was Secretary of Baker & Taylor Drilling Co., [see R. Tr. July 1-2, 1964, p. 66], that he had entered into an agreement to sell Tri-State an interest in this well on Section 2 and that the consideration to be paid of $60,000.00 was to come from Tri-State in the form of payment to Baker & Taylor of these drilling costs in the total sum of $60,000.00, and if it wasn't paid, Amend wanted to be informed because he didn't want to carry this interest himself and he had some other people he thought would buy it; that Bulls promised to keep him informed, and in fact later called Mr. Amend and told him that he had received the third check of $20,000.00 or $60,000.00.

If this isn't the equivalent of saying to Amend that the drilling cost on the Section 2 well had been paid, then I frankly do not know what to call it. Amend later testified that he was not informed that some of this money had been applied on the old Tri-State Account until about May 1, 1963. [See R. Tr. March, 1964, p. 73, lines 3-6; R. Tr. July, 1964, p. 95, line 26.]

Furthermore, the testimony of G. D. Bowie Jr., R. Tr. of July 1st and 2nd, 1964 beginning page 48, line 11 to line 4, page 56, shows the confusion which existed as to the entries of Tri-State's checks by Baker & Taylor, and that it considered Tri-State's account and that of J. D. Amend synonymous.

Testimony of Roy L. Bulls.

While Mr. Bulls wavered on some of the points in question and seemed to be confused, there was one thing on which he agreed with Mr. Amend and that was that they had an understanding to keep each other informed,

and that he did inform Mr. Amend about having received the other two checks of $20,000.00 each.

Mr. Bulls says that he had conversations with Mr. Amend about receiving $20,000.00 checks [Tr. p. 72, line 9.] At page 73 of the transcript the conversations were "before the time of the completion of the Wilbank's well" and he thought they were "in J. D.'s office," that no one was present except he and Mr. Amend. That "it was agreed between J. D. and I that he should —that should he get any moneys in payment of the drilling he would let me know, and if any should come to us I would let him know." [Tr. p. 73, line 19.]

While Mr. Bulls says this referred to the Nusbaum well, he immediately thereafter said it referred to all three wells, and was over a period of time. At the beginning of page 73 of the transcript, the Wilbanks well, which is Section 2, was specifically referred to.

On page 74, lines 19 to 21, the conversations were short and "usually in connection with or at the same time as one of the progress reports." He says he made one trip down to Amend's office about getting money specifically on the Nusbaum well [Tr. p. 74, lines 25-26] but that was "*before* the commencement of the Wilbank's well." (Emphasis ours) [Tr. p. 75, lines 1-3.]

All costs on the drilling of the well on Section 56 had been paid. Therefore, any conversation about money during the drilling of the Wilbank's well was about that one well.

At page 77, line 18 of the transcript, Mr. Bulls was asked the following questions, to which he gave the following answers:

> "Q. Was it by telephone or in person? A. By telephone.

Q. Was it more than one time, or do you know? A. I think on two occasions checks were received in our office and I called J. D. and told him the checks had been received."

This was before the completion of the Wilbank's well. [Tr. p. 77, line 26.]

At Tr. page 78, line 24, Mr. Bulls says:

"I probably stated it (the check) was from Tri-State." He says this was per our agreement "mine and J. D.'s agreement." [Tr. p. 79, lines 1-7.]

At Tr. page 80, line 2, Mr. Bulls says:

"I remember I think calling him on a *second check* that we received in the mail." — (Emphasis ours) —"That we had received a check for $20,000.00." He testified [Tr. p. 80, line 14] that Mr. Bowie merely told him that *the checks* were in.

We submit that the words "the checks" refer to the two $20,000.00 checks which had been mailed directly to Baker & Taylor. Mr. Amend delivered the one that was mailed to him.

Mr. Bulls says that he *does not think* that he told Mr. Amend that any money had been paid on the drilling contract on Section 2 [Tr. p. 82, line 21] but he does not testify positively. When Amend talked to him at the time the first $20,000.00 check was delivered, they were talking about the present drilling cost on Section 2, and any subsequent conversation about Tri-State's payments, especially in three separate sums which would equal the costs of the drilling of the Wilbank's well, should be understandable in ordinary everyday language.

It will be recalled that Mr. Bulls said he went to Amend's office once about payments on the Nusbaum well [Tr. p. 74, line 25.] At [Tr. p. 83, line 11] Mr. Amend gave to Mr. Bulls two checks of $5,000.00 each (these checks are in evidence) from Tri-State in payment on the Nusbaum well.

Mr. Amend never told Mr. Bulls that he would pay for the drilling of the well on Section 54. [Tr. p. 84, line 24.] Mr. Amend did agree to pay for the drilling of the well on Section 2 if Tri-State did not. [Tr. p. 85, lines 1-8.] Amend signed the contract for the drilling of the well on Section 2.

Mr. Bulls never told Mr. Amend what the balance was on Section 54 well. *He did not know.* [Tr. p. 86, line 6.] *For all he knew, when Mr. Amend gave him the two $5,000.00 checks from Tri-State* [Tr. p. 83, line 11], *that could have paid all that was due on the Nusbaum well.*

Mr. Bulls was asked [Tr. p. 88, line 24, to p. 89, line 26.]

> "Q. Now, did you call him up when two separate checks came in for $20,000.00 each, didn't you? A. Yes.
>
> Q. And you knew that one $20,000.00 check had been delivered to the office, didn't you, by Mr. Amend? A. Yes.
>
> Q. And didn't you tell him when you got the last $20,000.00 check through the mail that you had received the $60,000.00, three checks for $20,000.00 each? A. I never mentioned the total figure.
>
> Q. But you knew there were three $20,000.00 checks that came in about that time, didn't you? A.

I remember three $20,000.00 checks being involved, yes.

Q. And you mentioned that to Mr. Amend, didn't you? A. I don't remember mentioning that to him. I merely remember making the two separate calls telling him that a $20,000.00 check had been received each time.

Q. And didn't you tell him that you had received the full $60,000.00? A. No, sir.

Q. Well, you received the $60,000.00 at that time, hadn't you? A. I guess we had.

Q. And your understanding with Mr. Amend was that if he got in checks he would let you know and if you got in checks you would let him know, is that right? A. Yes, that was my understanding."

REPLY TO APPELLANT'S BRIEF.

Appellant under the heading of "Statement of the Case" makes incorrect and misleading statements as to the facts of the case. At pages 15 and 16 of its brief, in referring to the checks dated December 17th and 20, 1962 for $20,000.00 each from Tri-State Petroleum, Inc., it says: "Baker & Taylor received no direction from anyone as to how it should be applied." We submit that the quoted conversation between J. D. Amend and Roy Bulls was sufficient to convey to the Secretary of Baker & Taylor the fact that Tri-State was sending the money with which to pay the drilling costs on the Section 2 well, and the telephone calls from Bulls to Amend clearly indicated that it had been so received, and the Referee-Special Master so found, which is ample under General Order 47.

The deposit of the check dated December 17th on December 13th is admitted. (Brief, p. 15.) Baker &

Taylor, therefore, made application of this check to the Tri-State account four days before its authorized date.

Also, Appellant attempts to excuse the application of the check dated December 17th because "Tri-State Petroleum, Inc., did not owe Baker & Taylor Drilling Co. any debt at the time of the receipt of check No. 127 except for the drilling of the Nusbaum well.

Yet, according to Appellant, it without any direction, applied $9,963.37 of the $20,000.00 check of Tri-State toward the payment of the J. D. Amend account for the drilling of the well on Section 2 on December 17, 1962, the very day that No. 127 was dated. This application on the J. D. Amend account was not made until the old Tri-State account was paid in full, but where, may we ask, did Baker & Taylor get authority or sanction to apply money belonging to Tri-State to the Amend account, except through the conversation between J. D. Amend and Roy Bulls. This is evidence of the fact that the company knew on the date the check No. 127 was dated that it was Tri-State's intention to pay the drilling costs of Section 2 with these three $20,000.00 checks.

Baker & Taylor did not know of any account owing to it by Tri-State on December 13th, except the old Section 54 account, if Appellant is to be believed, yet by December 17, the day that check No. 127 was dated, it applied $9,963.37 of another check received from Tri-State to J. D. Amend's account, and at a time the Amend account was not due.

We do not believe that the treasurer of Baker & Taylor would have been quite so careless with Tri-State's funds had he not known the intentions and understandings between Tri-State, Amend and Roy Bulls. Neither

did these excuses impress the Special Master, as shown by the Findings.

Appellant's assertion (Brief, p. 17) to the effect that: "Any interest of Tri-State Petroleum, Inc. in or to the well located on Section 2 or the leasehold estate under which it was drilled must arise, if at all, from a letter of J. D. Amend dated February 11, 1963, addressed to H. F. Schlittler."

We wish to call the Court's attention to the fact that in addition to the letter, both J. D. Amend and H. F. Schlittler have testified to the agreement, and pursuant to said agreement Tri-State Petroleum, Inc. has paid the $60,000.00 drilling costs to Baker & Taylor.

Again, at page 19 of Appellant's brief, Appellant mentions the report of the Trustee filed August 9, 1963 regarding some 20½% interest in this property belonging to the estate. Again, we say that this report was not offered in evidence or taken into consideration by the Referee-Special Master in determining the issues and if it was, the Findings of the Referee-Special Master were contrary to the report. We repeat that the Referee's records will show that the persons promised percents in this well and lease have long since availed themselves of the right to pursue their remedy by the filing of claims in bankruptcy, which have been allowed, under the theory of the law announced in *Woods et al. v. Deck,* 112 F. 2d 739, giving them such a right. They cannot have both the percents promised and allowed claims.

Appellant seems to be concerned over the fact that by the time all liens and claims are paid against the property involved, the debtor will have nothing left. That need not concern Appellant, since the Trustee is satis-

fied that the value of the property is worth fighting for. It would be worth much less if Baker & Taylor were paid twice for one debt.

As to appellant's argument in the last paragraph of page 19 and page 20 of its brief, we submit that the Special Master and the District Court in the Findings have pretty well spelled out what the interest of the Trustee in the property is, and how and why that interest exists, and why Appellant does not have a valid lien against the property.

Baker & Taylor do not have a valid claim against J. D. Amend. It accepted money from Tri-State Petroleum, Inc. to pay for its cost of drilling the well in question with full knowledge that Tri-State was paying the drilling costs in order to acquire an interest in the well from Amend, and the Court so found upon adequate proof. Amend stands ready to convey the property. [R. Tr. March 24-25, 1964, p. 23, line 26, to p. 24, line 3.]

Appellant's Specifications of Error.

We do not propose to take the time, or to impose upon the Court 98 separate answers to assignments of error which could have very well been covered in a few assignments of error. We believe that we have already covered most of the assignments of error raised with the possible exception of insufficiency of evidence to support the Findings.

If we appear to repeat ourselves in our argument, it has been made necessary in answering the numerous assignments of error.

Finding of Fact No. II.

This Finding is supported by the testimony of J. D. Amend [R. Tr. March 24-25, 1964, beginning p. 13, line 20] and the testimony of H. F. Schlittler [R. Tr. March 24-25, 1964 beginning p. 163, line 16] and by the letter from J. D. Amend of February 11, 1963 which is set forth in full in the Trustee's Application, Appendix No. 1. See also R. Tr. March 24-25, 1964, p. 23, line 20, to p. 24, line 3.] A question arose as to whether Amend had an assignment of the lease from Phillips Petroleum [R. Tr. March 24-25, 1964, p. 30], but Phillips Petroleum has never refused to make an assignment.

Finding of Fact No. VI.

This Finding is likewise supported by the evidence cited above.

Finding of Fact No. XIII.

This Finding is supported by the evidence cited above which supports the other Findings.

Finding of Fact No. XV.

This Finding, except for the exception in the last line thereof, was requested by the Appellant. The exception is in line with and is supported by the evidence.

Finding of Fact Set Forth in Assignment of Error No. 34.

This Finding is entirely proper. We have hereinabove pointed out that on December 17, 1962, Appellant, without any apparent direction other than that coming from J. D. Amend to Roy Bulls on or about December 15th, gave the J. D. Amend account credit for $9,963.37 out of the last $20,000.00 check received. Baker & Tay-

lor certainly would not have applied Tri-State's money on the payment of J. D. Amend's debt without some authority from somewhere.

Assignment of Error No. 36 and 37.

The Findings of Fact complained of in the above assignments are proper and are supported by the evidence above cited. Roy Bulls admits that after the three $20,000.00 checks had been received, that he so informed J. D. Amend and Amend also testified to this fact and to the fact that he was not informed differently until sometime in May, 1963. [See Amend's testimony quoted by Appellant in its Appendix No. 10, bottom of p. 5.]

Assignment of Error No. 38.

This Finding here complained of is based upon the testimony that Tri-State paid Baker & Taylor a total of $60,000.00 for the drilling of the well, and from Mr. Bowie's testimony that the total drilling cost was only $57,200.00. [See R. Tr. March 24-25, 1964, p. 106, line 17.]

Appellant's Argument No. V, Page 47 of Brief.

Answering Appellant's argument beginning at page 47 of its brief, Appellant again refers to a report filed by the Trustee in Bankruptcy which was not, to our knowledge, offered in evidence by reference or otherwise and which the Special Master did not consider. And, in any event, the Referee found to the contrary of said report. The Referee's Finding as to the debtor's interest was in keeping with the evidence received to the effect that the debtor was to receive, and will receive upon the payment of three-fourths of certain costs and

expenses a three-fourths interest in the gas well and lease, as per letter of February 11, 1962.

This property was being held by J. D. Amend for himself and Tri-State Petroleum, Inc. as their interest may appear, at the time of bankruptcy. Amend's claim was not adverse to that of Tri-State Petroleum, Inc. Amend and Tri-State's interests were those of joint adventurers. Webster's New International Dictionary, Second Edition, Unabridged, in giving a definition of joint adventure, says:

> "A partnership or co-operative agreement between two or more persons, which is restricted to a single specific undertaking. Sometimes called also joint undertaking or joint venture."

Vol. 28, Cal. Jur. 2d, p. 475 defines a joint adventure as:

> "An undertaking by two or more persons jointly to carry out a single business enterprise for profit. It is in the nature of a partnership, but is a looser form of association and falls short of a partnership. The relationship of joint adventurers has been defined to be that of a mutual agency akin to a limited partnership."

> "Each member of the joint venture is the agent of the others in transaction of its business."

Engineering, etc. Corp. v. Longridge Inv. Co., 153 Cal. App. 2d 404 at 411.

> "Relationship of joint venturers is that of a mutual agency, akin to limited partnership."

Leming v. Oil Fields Trucking Co., 44 Cal. 2d 343.

See also:

Lantz v. Stribling, 130 Cal. App. 2d 476;

Campagna v. Market Street Railway Co., 25 Cal. 2d 304;

Elias v. Erwin, 129 Cal. App. 2d 313;

Buckley v. Chadwick, 45 Cal. 2d 183;

28 Cal. Jur. 2d, p. 491, Sec. 10.

Roy Bulls says: [R. Tr. July 1-2, 1964, beginning p. 75, line 7] that Amend was the only man we ever had any dealings with, with respect to either of the three wells. [See also same transcript, p. 85, line 13] so Amend was also the agent of Tri-State. Roy Bulls also says: [R. T. July 1-2, 1964] they never billed Amend for money owing on Section 54, and he didn't know what, if anything, was owing on Section 54. [R. Tr. July 1-2, 1964, p. 85, line 20, to p. 86, line 6.] [R. Tr. July 1-2, 1964, beginning p. 51, line 19.]

So it is apparent that Amend, who had possession of the property in question, was holding the same for himself and Tri-State Petroleum, Inc. who were joint adventurers, and he definitely had no adverse interest to that of Tri-State Petroleum, Inc., but conceded the entire interest claimed by Tri-State.

The law cited by Appellant in its brief, beginning on page 47, is not helpful to Appellant's contention because of the difference in the facts found to be true in this case.

Statements of the law in decisions by Courts are based upon the facts of the particular case. We submit that the Special Master's Findings of Fact must be accepted under General Order 47, and under said Findings

the Special Master had summary jurisdiction of the issues in question.

In re Standard Gas & Electric Co., 119 F. 2d 658, cited by Appellant in support of its contention (Brief, p. 52) says:

> "The jurisdiction which is exercised by courts of bankruptcy in summary form has uniformly been held to extend only to the person of the bankrupt and to property in his possession or *in the possession of third persons who do not claim adversely to him or whose claims are colorable only.*" (Emphasis ours.)

Also in Appellant's quotation from *Taubel-Scott-Kitzmiller Company, Inc. v. Fox,* 264 U.S. 426, 44 S.Ct. 396, ... L. Ed. 770, on page 52 of its brief, it is said

> "Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower Federal court, *jurisdiction of the controversy, by conferring jurisdiction over the person in whose possession the property is.*" (Emphasis ours.)

The case of *Bay City Shovels, Inc. v. Schueler,* 245 F. 2d 73, cited by Appellant is not in point because of the difference in the factual situation.

Transaction Between Baker & Taylor and J. D. Amend Is Not Wholly Unrelated to the Purposes of the Bankruptcy Act or the Purposes of the Debtor Proceeding.

Appellant cites Collier and Remington in support of its theory that the action here taken is wholly unrelated to Tri-State or the bankruptcy proceeding. This is a false factual theory under which Appellant is laboring.

We have pointed out above that the relationship of J. D. Amend and Tri-State Petroleum is that of joint adventurers, and that J. D. Amend, in acting for the joint benefit of the venture, acted as the agent of Tri-State Petroleum, Inc. Here, we have an agreement between J. D. Amend and Tri-State that Tri-State will pay the drilling costs of Baker & Taylor in consideration for an interest in the venture. Tri-State contends and has proven to the satisfaction of the Special Master and the District Court that it has already paid the same.

Baker & Taylor is not content with this ruling and seeks state court action against J. D. Amend who signed the contract to recover what it still contends is due. We have already pointed out why and how such litigation, if successful, is far more detrimental to Tri-State than it would be to J. D. Amend.

We repeat that if such a judgment were secured against J. D. Amend, Tri-State would have to satisfy same in order to be entitled to receive a three-fourths interest in this well, notwithstanding that it has already secured a judgment against Baker & Taylor, based upon ample evidence under General Order 47, that the claim has been fully paid by it.

So we see that the Trustee and the estate has a vital interest in stopping further court action in this matter.

The delay already caused and the uncertainties of the outcome have already damaged the bankruptcy estate through the difficulty of obtaining a buyer under the circumstances, and has impeded and embarrassed the administration of the estate and the perfection of a Plan of Reorganization. Further litigation will be highly detrimental to the estate.

With reference to J. D. Amend directing application as to how the funds were to be applied:

When he told Roy Bulls that Tri-State had agreed to pay these costs (drilling costs) and if it did not do so, he wanted to know it, because he had someone else he could sell it to, and that he couldn't afford to carry it himself, and in answer thereto, Roy Bulls called him and told him his company had received the two checks for $20,000.00 each in addition to the one delivered by Amend; that in addition thereto, the one delivered by J. D. Amend was marked "Section 2," we believe the Court was justified in concluding that this was the equivalent to a direction, and that Roy Bulls knew what was intended by Amend's statement, and especially when neither Amend nor Bulls knew at the time that there was a balance due from Tri-State on the Section 54 contract, or on other indebtedness except the drilling costs on Section 2.

Amend Was Not Aware and Not Informed That All of the Drilling Costs of Section 54 Had Not Been Paid Until Some Time in May, 1963.

Upon the above subject matter, Amend at page 13, lines 10-19, March 1964 R. Tr., testified:

> "Q. Now, do you know whether or not all of the drilling costs were ever paid on that well? A. No, I don't.
>
> Q. Were you prior to December 20th of 1962 ever informed by Baker & Taylor, or anyone else, that the drilling costs had not been paid? A. No, I was not.
>
> Q. Were you laboring under the impression they had been paid? A. Yes."

and again, at page 72, line 19, to page 73, line 6, March 1964 R. Tr., Mr. Amend testified:

> "Q. By Mr. Utley: Did Mr. Bulls at that time advise you of any other indebtedness owed by Tri-State to Baker & Taylor? A. No.
>
> Q. Did Mr. Bulls at any time advise you that a portion of the three $20,000.00 checks had been applied on some preexisting indebtedness? A. No.
>
> Q. When did you first learn that it had been applied on some preexisting indebtedness? A. Well, it was some months later, or some weeks later, probably along in May or some time about that time.
>
> Q. You mean the following year? A. Yes, 1963."

We have already quoted and referred to testimony of J. D. Amend, Roy Bulls and H. F. Schlittler, which supports the Court's Findings and Conclusions of Law complained of on pages 66 to 69 of Appellant's brief.

Finding of Fact No. XXV.

This Finding is supported by the testimony of J. D. Amend and H. F. Schlittler above cited.

Findings of Fact No. XXVI and No. XXVII.

These Findings are certainly established by the evidence above cited, and the records and Exhibits before the Court.

Conclusions of Law.

The Conclusions of Law made by the Court are all proper and based upon the Findings of Fact made by the Court.

Conclusion of Law No. XIII only prevents Baker & Taylor from pursuing its action in the State Court against J. D. Amend or Tri-State based upon its claim of an alleged balance due for the drilling of the gas well on Section 2. Such an action against J. D. Amend, as we have hereinabove pointed out, would vitally affect the rights and interests of debtor, and impede and embarrass the proper administration of the debtor estate.

When Collier on Bankruptcy, cited by Appellant on page 54 of its brief, said "*Ordinarily* a court of bankruptcy will not take jurisdiction of a controversy between two parties over a matter concerning which the Trustee of the bankrupt estate *has no interest*" [emphasis ours] it certainly was not referring to a situation where the trustee of a bankrupt has an admitted and conceded right, under the terms of an agreement, to a three-fourths interest in an oil well by the payment of an additional $40,000.00, or if the well is sold, then the $40,000.00 may be paid out of the purchase price. If that isn't a valuable property right under Section 70a of the Bankruptcy Act, then we do not know what to call it, more especially where the debtor already has an investment therein of $60,000.00.

Appellant's difficulty arises from its idea of the facts, rather than the facts found to exist by the Court, based upon ample evidence.

Kaplan & Guttman, 217 F. 2d 481, is not in point because in that case the Bankruptcy Court had previously held that Guttman, the bankrupt, had no interest in the property.

Answering Appellant's argument (Brief, p. 57) to the effect that the debt to it was by J. D. Amend pur-

suant to contract and not by Tri-State Petroleum, Inc. Our answer again is that it was a debt and obligation of Tri-State to J. D. Amend by contract, and an obligation under the law as a joint adventure to both J. D. Amend and Tri-State Petroleum, Inc. See 28 Cal. Jur. 2d, page 489.

The case of *In re Magnus Harmonica Corp.*, 233 F. 2d 803, involved a suit against officers of the debtor corporation who were guarantors of an obligation of the debtor corporation, which case is not in point under the facts of this case.

The court says in the above decision that the only question for it to decide whether the injunction was one which was necessary to protect the jurisdiction of the Bankruptcy Court.

In the case here before the Court, there is a vital and well founded reason for the jurisdiction of the Bankruptcy Court to be upheld.

Without unduly extending the argument on other cases cited by Appellant, suffice it to say that in each of them there is a distinguishing difference in the factual picture.

Estoppel.

Counsel for Appellants and the writer of this brief are agreed on one point, and that is that the Texas law on the question of estoppel and the law of California are substantially the same.

Appellants have cited both Texas and California law upon the question of estoppel and so have we. Our citations of law upon this point appear in our Appendix No. 6

We submit that the evidence which the Court found to be true supports the conclusion of estoppel under the cases and law cited in connection therewith.

While it may be that check No. 127 which was dated December 17, 1962 may have been received on December 13, 1962, it nevertheless was dated Decmber 17, 1962 and Baker & Taylor was without authority to use this check or to apply its proceeds prior to December 17, 1962. By that time it had been advised of the purpose for which these checks were mailed. We have covered this point in prior argument.

The check which Amend received and delivered to Mr. Bulls was dated December 15, 1962 and was delivered on or about that date. It had a notation that it was in payment of Section 2.

But regardless of when the checks were received, Mr. Bulls had led Mr. Amend to believe to his detriment, and to the detriment of Tri-State that the drilling cost on Section 2 had been paid, and neither he nor Tri-State knew otherwise until May and June of 1963. [See R. Tr. March 24, 1964, p. 73.]

Both Mr. Bowie and Bulls testified that the company mailed no invoices which would be a means of notification of any balance due.

Conclusion.

We respectfully submit that the Bankruptcy Court had summary jurisdiction to hear and determine all the matters herein; that the Findings of Fact and Conclusions of Law are amply supported by the evidence and the law of the case, and the District Court was justified in sustaining the Special Master pursuant to General Order 47.

Respectfully submitted,

ERNEST R. UTLEY and
HUBERT F. LAUGHARN,
Attorneys for Trustee.

Certificate.

We certify that, in connection with the preparation of this Brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing Brief is in full compliance with those rules.

ERNEST R. UTLEY

APPENDIX NO. 1.

The Application of R. W. Stafford, Trustee of the above entitled estate, respectfully represents:

I.

That he is the duly and regularly appointed and qualified Trustee of the above entitled estate, and has been acting in such capacity since on or about the 24th day of June, 1963.

II.

That among the properties in which the debtor corporation has an interest are certain oil and gas wells and leases located in Hansford County, State of Texas, and among which is a gas well located on the Southeast Quarter of Section 2, Block 1, H&GN Ry. Co. Survey, County of Hansford, State of Texas.

III.

That the predecessor of the debtor corporation, to wit, Midwest Petroleum Corporation, became interested during the latter part of 1961 with J. D. Amend of Amarillo, Texas, in the drilling of certain oil and gas wells in the County of Hansford, State of Texas, and on or about the 29th day of October, 1962, J. D. Amend, acting in behalf of himself and the debtor corporation, entered into an oil and gas lease with Phillips Petroleum Company, a Delaware corporation, with offices at Bartlesville, Oklahoma, for the drilling of an oil and gas well upon the Southeast Quarter of Section 2, Block 1, H&GN Ry. Co., County of Hansford, State of Texas, and as evidence of said agreement between said J. D. Amend and the debtor corporation, J. D. Amend on February 11, 1963 addressed a communication to H. F. Schlittler, 1904 Truxton Avenue, Bakersfield, Califor-

nia, who was then the President of said debtor corporation, which letter sets forth the following:

"Mr. H. F. Schlittler
1904 Truxton Ave.
Bakersfield, California

'Re: Sec. 2, Block 1,
H&GN, Hansford Co.,
Texas

Dear Foy:

This letter will confirm our agreement as to the Cleveland Gas well on the above captioned Section.

You will be assigned a 3/4 interest in this well subject to the customary 1/8 royalty, a 1/32 override to Phillips Pet. Co. and a 1/32 (one thirtysecond) override to the people from whom the deal was obtained. This assignment will be made to you or by the order of you when the well is finally completed and all expenses have been taken care of by each of us as to the percentage which we own.

The agreement with Phillips is enclosed so you will have a thorough knowledge of the transaction and in case you are successful in making a deal with some one on Sec. 2 and also the S/2 of Sec. 56, Blk. 4, T&NO, Hansford County, you can present a true picture of the lease.

This deal will have additional good locations such as a lower morrow on Sec. 2 and an excellent Upper morrow on 56. There are also additional locations for the Marmaton in both leases and especially on Sec. 56. The Phillips Well in Sec. 2 made over 6,000,000 cu ft of Gas natural and was ruined when treated. This zone is a certainty.

The well is cleaning up and we will try to get a potential in the next 4 or 5 days. I have already contacted Northern Natural and we should get a connection in the near future. In line with our telephone conversation, it will be to our mutual advantage to sell this well and our additional interest in 56 so that we can proceed with the development of the BA farmout.

Regards.

"s/ J. D. AMEND"
J. D. Amend"

IV.

That after entering into said lease, drilling operations were commenced and a well was drilled which produced and is capable of producing large quantities of gas and oil. That the debtor corporation for the purpose of drilling said well, advanced large and substantial sums of money to assist in defraying the expenses of drilling said well, as hereinafter more particularly set forth.

V.

That in addition to the monies advanced by the debtor, it appears that certain obligations were incurred which have not yet been paid and satisfied, and certain creditors claim a lien upon said gas well and property, and because of their asserted liens, the Northern Natural Gas Company has refused and is still refusing to purchase and accept gas from said well and by reason thereof, said well is inoperative.

VI.

That among the creditors claiming a lien upon said well and property are the following:

Baker & Taylor Drilling Co., a corporation, with offices at Amarillo, Texas, claims a lien upon said property

in the sum of $27,536.78 by virtue of certain work and drilling operations performed by said company upon said property.

Halliburton Company, a corporation, with offices located at Duncan, Oklahoma, claims a lien upon said property in the total amount of $18,816.11.

Welex, a Division of Halliburton Company, claims a lien in the total sum of $2538.36.

Beacon Supply Company, a corporation, with offices located at Pampa, Texas, claims a lien on said well and property in the total amount of $3709.88.

J. D. Amend paid certain claims against said well and in so doing, created a lien thereon in favor of Upshaw Investment Company in the total sum of $20,000.00 for the purpose of securing funds to pay said claims. It is believed that J. D. Amend may have paid claims against said well in excess of the $20,000.00 hereinabove mentioned.

VII.

Your Applicant is informed and believes and upon such information and belief alleges that during the drilling of said well and during the month of December, 1962, debtor corporation paid directly to Baker & Taylor Drilling Company, a corporation, the sum of $60,000.00, represented by three separate checks made payable to Baker & Taylor Drilling Co. for the purpose of applying same upon the drilling operations upon the aforesaid gas well. That it appears from the alleged lien claim of Baker & Taylor Drilling Co. that credit has only been given for the total payment of $29,363.22. That in addition to the three $20,000.00 checks issued in December, 1962 to Baker & Taylor Drilling Co., it appears from the debtor's records that it also paid Baker

& Taylor Drilling Co. for other drilling operations the sum of $40,000.00 in or about the month of August, 1962. That said Baker & Taylor Drilling Co. has not accounted for the application of the aforesaid funds.

VIII.

Your Applicant is informed and believes and upon such information and belief alleges that Simco, a corporation, located in Amarillo, Texas, claims an indebtedness against the debtor and said property in the total sum of $1050.40, but insofar as your Applicant is aware, Simco does not claim a lien on said property.

IX.

Your Applicant does not have sufficient information upon which to base an accurate determination of the exact amount due each of the aforementioned creditors of the debtor corporation, or as to the validity of the claimed liens on said property, and it will be necessary for the proper administration of this estate that the validity and amount of said liens and claims be determined by this Honorable Court, and that the lien rights of such creditors be transferred to the funds to be received from the production and/or sale of said property, with the same force and effect as they now attach to the property and gas well itself, and so as to permit your Applicant to operate said property and to secure revenue therefrom for the purpose of paying said obligations.

Your applicant is informed and believes and upon such information and belief alleges, that from the operation of said property and from funds which have been promised by certain investor-creditors of the above entitled estate, that said obligations can soon be satisfied in

full. It is quite obvious that no progress can be made in the operation of said property or in the production of gas therefrom, so long as said lien rights attach to the gas to be removed from said well as the Northern Natural Gas Company refuses to purchase or accept said gas so long as liens exist against same.

X.

That your Trustee, in company with one of his counsel, Ernest R. Utley, attended a conference with certain of the above named creditors at Amarillo, Texas, on February 13, 1964, including Max Banks, President of Baker & Taylor Drilling Co., J. D. Amend, Harold Proue, Division Credit Manager of Halliburton Company, at which time all of those present, except Baker & Taylor Drilling Co., agreed to forego any action towards the enforcement of their claims for a period of two weeks, to give the investor-creditors of debtor corporation an opportunity to raise funds for the purpose of satisfying at least 50% of said claims, but the said Baker & Taylor Drilling Co. refused to extend to debtor any time whatsoever, notwithstanding the fact that it was informed that the Judge of this Honorable Court had on or about the 24th day of June, 1963 issued a restraining order, which provides as follows:

> "That until further order of this Court, all creditors and stockholders, and all sheriffs, marshals and other officers, and other respective attorneys, employees and other agents, and all persons, firms and corporations, are hereby jointly and severally enjoined and restrained from, directly or indirectly in any way or manner, commencing or continuing any action, suit or proceeding against the debtor or the trustee in any court or before any adminis-

trative agency or other tribunal, or causing the issuance or execution of any writ, process, summons, attachment, subpoena, claim and delivery, replevin, or other process, for the purpose of impounding or taking possession of or interfering with the possession of, or enforcing a lien upon, any property owned by or in the possession of the debtor or the Trustee; and from doing any act or thing whatsoever, directly or indirectly, in any way or manner, to interfere with the possession or management by the debtor or the Trustee of the property and assets of the debtor's estate; and from interfering, directly or indirectly in any way or manner, with the Trustee in the discharge of any of his duties; and from interfering, directly or indirectly in any way or manner, with the exclusive jurisdiction of this Court over the debtor and the Trustee and all property and interests in property comprising the debtor's estate; and all persons, firms or corporations owning any lands or buildings occupied in whole or in part by the debtor or the trustee, or wherein is contained any property of the debtor's estate, are jointly and severally enjoined and restrained, until further order of this Court, from directly or indirectly, in any way or manner, evicting the debtor or the Trustee, or removing or interfering with the possession or use or removal by the debtor or the Trustee of any such property."

That a copy of said Order of the Judge, incorporating said Restraining Order, was served upon Baker & Taylor Drilling Co. and Halliburton Company. Baker & Taylor Drilling Co. then and there threatened and still

threatens to file a suit for the purpose of the enforcement of their lien upon said property.

XI.

That by reason of the above, your Applicant believes that it would be advisable and for the best interests of this estate, to have this Honorable Court issue its Order to Show Cause upon each of said creditors, requiring them to show cause if any they have, why each of said creditors should not be required to establish the validity of their claims, as well as the validity of any claimed lien to the property hereinabove mentioned, and why the Court should not hold and determine that the debtor corporation has an interest and property right in the gas well and lease herein described, and why any creditor and/or its attorney who has knowingly violated the Restraining Order of this Honorable Court, should not be certified for contempt of court.

XII.

Your Applicant further states that it is his belief that this Honorable Court should direct your Applicant, after notice to the aforementioned creditors, the course which should be pursued with reference to the payment of the aforementioned claims after the exact amounts thereof have been established, as well as the course to be pursued in the operation of said property.

Your Applicant has been informed and believes, and upon such information and belief alleges, that if said gas well is operated, it will eventually, produce for the

creditors of this estate, a sum well in excess of $300,-000.00, and said asset should be preserved for the benefit of the creditors of this estate.

WHEREFORE, your Applicant prays that this Honorable Court issue its Order to Show Cause ordering and directing Baker & Taylor Drilling Co., Amarillo, Texas; Halliburton Company, Duncan, Oklahoma; Welex, a Division of Halliburton Company; Beacon Supply Company, Pampa, Texas, and J. D. Amend, Amarillo, Texas, and each of them, to show cause before this Honorable Court on a day to be fixed, why they, and each of them, should not be required to establish the amount of their claim and the validity of any claimed lien before this Honorable Court, and why any valid liens found to be in existence should not be transferred to the funds received from the operation of said well, or from the sale of said lease and property, and Trustee should not be permitted to operate said property for the purpose of paying off all claims against said property; and doing such other acts as may be required for the preservation of this estate and in its best interests; and why it should not be determined that each of said creditors are amenable and subject to the Restraining Order of this Court, and therefore enjoined from filing or prosecuting any pending litigation against the property herein described until the further Order of this Court, and why each of such creditors should not be required to comply with the provisions of said Restraining Order; and why any of the creditors

or their attorneys hereinabove mentioned who have knowingly violated the Restraining Order of this Honorable Court, should not be certified for contempt of court; and why this Honorable Court should not direct the Trustee in connection with the extent of his operations of said property; and, for such other and further relief as to the Court may seem just and proper in the premises.

Dated this 19th day of February, 1964.

/s/ R. W. Stafford
Trustee

Ernest R. Utley and
Hubert F. Laugharn

By .....
Ernest R. Utley
Attorneys for Trustee"

APPENDIX NO. 2.

Upon reading and filing the application of R. W. Stafford, Trustee of the above entitled estate, and good cause appearing therefor,

It Is Ordered that Baker & Taylor Drilling Company, Amarillo, Texas Halliburton Company, Duncan, Oklahoma, Welex, a Division of Halliburton Company, Beacon Supply Company, Pampa, Texas, and J. D. Amend, Amarillo, Texas, and each of them, or anyone acting for or in their behalf, be, and each of them is ordered to appear before this Court at its courtroom at Room 324 United States Post office and Courthouse Building, Los Angeles, California, on the 28th day of February, 1964, at the hour of 2:00 P.M. of said day, and to show cause if any they or either of them have, why they should not be required at said hearing to establish the amount of their claim, if any, and the validity of any claimed liens upon any property belonging to debtor herein, including the oil and gas well described in the application of the Trustee herein, a copy of which Application is ordered to be served herewith, and why the aforementioned creditors, and each of them, should not be required to abide by the Restraining Order of this Honorable Court issued on the 24th day of June, 1963, a copy of which is set forth in the Application of the Trustee herein; and why any creditor who has knowingly violated said Restraining Order should not be certified for contempt of this Court; and

It is Further Ordered that Respondents herein, and each of them, show cause, if any they or either of them have, why any lien rights shown to exist against said gas well and property should not be transferred to the

funds received from the sale and/or operation of said well, with the same force and effect as they now attach to the property itself; and,

It is Further Ordered that service of this Order to Show Cause and the Application of the Trustee being attached thereto, may be served either personally or by United States mail upon each of the Respondents at their last known place of address; and

It is Further Ordered that in the event any of said Respondents desire to appear and resist this Order, that they, and each of them, be required to file a written answer setting forth their defensive position at least two (2) days before the date of hearing of this Order to Show Cause, and that such answer be served upon the Trustee or his Counsel; and

It is Further Ordered that pending the hearing of the within Order to Show Cause, the aforementioned Respondents, and each of them, are held amenable to the restraining order of the Court, and are restrained from commencing the prosecution of any litigation or from further prosecution of any litigation now pending which seeks a judgment or the foreclosure of any claimed lien against the property of the oil and gas well herein mentioned.

Dated February 19, 1964."

/s/ Ronald Walker
Referee in Bankruptcy"

APPENDIX NO. 3.

TO THE HONORABLE RONALD L. WALKER, REFEREE IN BANKRUPTCY:

J. D. Amend, in answer to the Application of R. W. Stafford, respectfully represents:

I.

That he is the operator and only operator of the J. D. Amend #1 V. W. Wilbanks, 1250′ from the S and E, Section 2, Block 1, H&GN Survey, Hansford County, Texas, and that his interest in this well amounts to twenty-five per cent (25%) of the working interest.

II.

That it is impossible, under present conditions, to produce the well or properly secure title to or assign title to same for the following reasons: On October 29, 1962 Phillips Petroleum Company of Bartlesville, Oklahoma and J. D. Amend of Amarillo, Texas entered into an agreement for the development of the above mentioned gas well. Paragraph II, pertaining to assignment reads as follows:

'In the event the well for which provision is made in numerical paragraph I hereof shall be commenced, drilled and completed to the total depth therein specified, all within the time and in the manner provided in this agreement, and provided that Second Party shall have fully complied with all of the other terms and provisions of this agreement, and provided further Second Party shall have furnished Phillips with evidence satisfactory to it that all bills for labor and material in connection with Second Party's operations have been fully paid, then and thereupon, Phillips agrees, subject to the conditions, exceptions, reservations, covenants and agree-

ments hereinafter set forth, to assign and transfer unto Second Party, without representation or warranty of title, either express or implied, all of its right, title and interest in and to the oil and gas lease (or leases) described in Exhibit "A" insofar as said oil and gas lease (or leases) covers and pertains to the oil and casinghead gas, and all rights pertaining thereto, in the lands specifically described in Exhibit "A".'

III.

That J. D. Amend does not recognize anyone as having any interest in this well until such time as all bills have been paid and H. F. Schlittler, or his successor has so described the manner in which the assignment of the 75% working interest is to be made. The said J. D. Amend does not deny that Tri-State Petroleum, Inc. may be able to establish some grounds for an interest in this well but he merely states that he does not have any way of determining to whom the 75% interest belongs; and also, that J. D. Amend has never had a deal with Tri-State Petroleum, Inc., but that his arrangement was made with H. F. Schlittler, R. S. Fish and J. H. Johnson individually. (Copy of confirmation letters attached.)

IV.

Operator J. D. Amend's 25% interest is free of and is in no way connected with the remaining 75% working interest.

V.

That he does not know to whom the remaining 75% working interest actually belongs even though he is aware that three $20,000.00 checks, or an aggregate of $60,000.00 were received by Baker & Taylor Drilling Company of Amarillo, Texas and sent by Tri-State Pe-

troleum, Inc. of Bakersfield, California; said checks being received by Baker & Taylor Drilling Co. between the date of the signing of the agreement between Phillips Petroleum Company and J. D. Amend and the completion of the drilling of the gas well about the first of January, 1963. The fact that the checks were sent by Tri-State Petroleum Company would not reflect the manner or to whom any interest in this well would actually belong because in the past on other drilling operations covered by the same deal monies were received from other sources at the direction of H. F. Schlittler, and at no time did said checks indicate how the final assignments of interest were to be made.

VI.

J. D. Amend, as the operator, has paid $26,024.69 of the valid claims and bills incurred in the drilling and completion of this well. Of this amount $6,024.69 has been paid from the funds of the said J. D. Amend and as operator he has borrowed $20,000.00 (bearing interest at the rate of 6%) from the Upshaw Investment Company of Amarillo, Texas to pay the balance of the $26,024.69. In addition the following valid bills are to be paid to the following in the amounts herein set forth are past due and legitimate:

A. Halliburton Company, $18,816.11, drawing 7% interest

B. Welex, $2538.36, drawing 7% interest

C. Beacon Supply Company, $3709.88, drawing 7% interest

D. Semco, $1050.49

E. John H. Nicholson, Geologist, $540.00.

The said J. D. Amend states that all of the above mentioned accounts or bills are just and valid. (Copy of Deed of Trust attached).

VII.

That there is also a claim of Baker & Taylor Drilling Co. in the amount of $27,536.78. This claim may or may not be valid and must be determined as to not only its validity but to its extent. The $60,000.00 mentioned above and received by Baker & Taylor before the first of January, 1963 and of which fact Baker & Taylor notified the said J. D. Amend as having received the said amounts and it was the supposition of J. D. Amend that the $60,000.00 would be credited to the drilling contract (a copy of which is herein attached) and it was not until several weeks later that Baker & Taylor notified J. D. Amend that part of the $60,000.00 had been credited to the account of Tri-State Petroleum, Inc. for the drilling of its well on Section 54, Block 4T, T&NO Rr. Survey, Hansford County, Texas; and that they, Baker & Taylor Drilling Co., still showed from their books that J. D. Amend still owed them approximately one-half of the amount of their claim against the J. D. Amend #1 V. W. Wilbanks well and that Tri-State Petroleum likewise owed them a similar even though not an exact amount for the drilling of the well on Section 54 by Tri-State Petroleum, Inc. (Plats showing locations and operators are attached).

VIII.

That there are two things that need to be resolved in this matter (a) the ownership of the 75% working interest other than the operator's 25%; and (b) the validity and the extent of the Baker & Taylor claim in the amount of $27,536.78.

IX.

That the operator J. D. Amend, in cooperation with R. W. Stafford, Trustee and Mr. Ernest R. Utley, his attorney, has endeavored for more than one year, without results, to sell the well at a reasonable profit.

X.

That the delay in getting the gas well into production has worked a hardship on all the valid creditors as well as J. D. Amend the operator. It is also to be noted that the royalty owners interested in this well are being drained by presently producing gas wells on adjacent leases.

XI.

That the said J. D. Amend has offered to sell the well to H. F. Schlittler and also to the Public Securities Holders Committee for a very reasonable and nominal amount and that in both cases the offer was not accepted.

WHEREFORE, the said J. D. Amend prays that this Honorable Court, if it determines this matter to be within its jurisdiction, issue its order determining the validity of and to what extent, if any, the Baker & Taylor claim should be paid; and that it further declare all the claims shown in Paragraph 6C to be just and valid and subject to be paid (all invoices pertaining to these claims have been furnished to H. F. Schlittler and practically all of them have been furnished to R. W. Stafford, Trustee) and that the Honorable Court issue an order whereby J. D. Amend, in cooperation with W. A. Stafford, Trustee, and his attorney, Ernest R. Utley be permitted to continue until successful, his search for an acceptable purchaser of the gas well. That

he be permitted to pay the legitimate bills and divide the proceeds, if any remain, from such sale according to the interest as set out in this answer, and further, that that portion of the monies, if any, belonging to the 75% working interest which has not at this time been determined, be placed in an escrow account subject to its finally being paid to the rightful owners.

Dated this 24th day of February, 1964."

s/ "J. D. Amend"
J. D. Amend"
Operator

APPENDIX NO. 4.

TO THE HONORABLE RONALD L. WALKER, REFEREE IN BANKRUPTCY:

Supplement to J. D. Amend's Petition in Answer to R. W. Stafford, Trustee, in the Matter of Tri-State Petroleum, Inc.

I.

It is absolutely essential that the Bankruptcy Court order that all lien rights shown to exist against said gas well and properties should be transferred to the funds received from the sale of the property.

II.

That it has been shown that the sale of the property is essential and that any further delay will only add to the hardships of the operator, the creditors, and especially the royalty owners in that their properties are now being drained and their only relief is to have the gas well put in operation. That no one would suffer any hardship from the sale of this well.

III.

That the only claim in which there is a question is that of Baker & Taylor Drilling Company in the amount of $27,536.78, and the determination of how this is to be paid will affect no one other than Baker & Taylor Drilling Company and the Investors, along with Tri-State Petroleum, Inc. It is to be noted that the operator, J. D. Amend, has already fulfilled his obligation as to the actual drilling of the well. He is also agreeable to participating in the payment of completion costs to the extent of his interest; and whether Baker & Taylor Drilling Company's claim is declared valid completely or in part will be of no consequence to him.

IV.

It is proposed that the well be sold to a prospective purchaser who is being contacted by the operator at the present time, that all valid bills be paid and that the amount of the claim to Baker & Taylor Drilling Company be placed in escrow, subject to its being paid to the rightful owners at the order of a properly constituted court of law.

Dated this 2nd day of March, A. D. 1964.

s/J. D. Amend"
J. D. Amend
Operator"

APPENDIX NO. 5.

Law of the Case Re Direction of Payment.

44 Texas Jurisprudence 2d, Page 687, says:

> "There need not be an expressed agreement, but a tacit understanding of the parties is sufficient, and their real intention, however manifested or ascertained, is controlling. Whether there was such an agreement is usually a question for the jury. If the creditor fails to apply payments as agreed, or misapplies them, equity will require that they be properly credited, as of the date of payment."

At Page 692, 44 Texas Jurisprudence 2d, Paragraph 37, it is said:

> "Ordinarily the debtor's direction for application must be made at the time of payment, or at least before any controversy as to the matter has arisen. But where, by mistake, the debtor fails to direct the application, and the creditor applies the payments to a debt other than the one intended by the debtor, the creditor should correct the mistake when his attention is called to it shortly thereafter, unless in the meantime something has intervened that would put him to a disadvantage if he did so."
>
> "A direction as to the mode of application may be implied from circumstances."
>
> See: *Bray v. Crain,* 59 Texas 649;
>
> See also: 40 Am. Jur., Page 804, ¶140.

Mr. Amend was the person liable for the payments to Baker & Taylor under the drilling contract for Section 2. He was the debtor and had the right to direct

payments whether they came from Tri-State or whoever may have sent payments. Tri-State's checks were given for the purpose of acquiring an interest from Amend in the well.

It was made known to Mr. Bulls, the Secretary of the company, that Amend expected the payments for the drilling of the well on Section 2 to come from Tri-State, and if they didn't come, he wanted to know it so that he might sell this interest to some one else. He was notified that the three $20,000.00 checks were received, and if that isn't the same as saying that the account had been paid, we are at a loss to know what to call it. It certainly lulled Mr. Amend into a sense of security and kept him from getting other purchasers for this interest. Baker & Taylor by reason thereof is now estopped from asserting otherwise. This estoppel is effective in favor of both Amend and Tri-State. Amend directed Tri-State to send these checks to Baker & Taylor. Rep. Tr., P. 58, March, 1964.

The direction to apply funds ordinarily is made at the time of payment, but may be made under the Texas law which we have cited in the aforementioned Points and Authorities before any controversy as to the matter has arisen, and where by mistake, the debtor fails to direct the application, and the creditor applies the payments to a debt other than the one intended by the debtor, the creditor should correct the mistake when his attention is called to it shortly thereafter. So says Texas Jurisprudence above quoted.

Also, the rights of third parties should be protected. *Temple National Bank v. Blackburn,* 235 S.W. 2d 462;

See also:

Dunn et al. v. Second National Bank of Houston, 113 S.W. 165; 115 A.L.R. 730 at 739.

"Where there is no direction as to the application of a payment, the creditor shall determine how it shall be applied unless the application made is *unreasonable or would work an injustice to the debtor.*"

Bray v. Crain, 59 Texas 649. [Emphasis ours.]

It would most certainly be unreasonable and unjust to permit Baker & Taylor to assert a claim or lien against this property, standing in the name of Mr. Amend, but in which debtor has an admitted interest, after Mr. Amend was led to believe that the $60,000.00 drilling cost to said company had been paid, and was thereby lulled into a sense of security, and was thereby prevented from protecting himself by securing another purchaser for his interest. (See Rep.Tr., P. 73, L. 14 to L. 6, P. 74)

Conceding for the sake of argument, although we are not sure,, that the $20,000.00 check first received by Baker & Taylor from Tri-State was the one dated December 17, 1962, and not the one delivered by Mr. Amend, Baker & Taylor had no legal right to use this check before the date given on the check and certainly by that time Mr. Bulls had conferred with Mr. Amend and knew that Baker & Taylor should be receiving checks from Tri-State for the account of the Section 2 well, and it was after all the checks had been received that Mr. Bulls, by his statement to Mr. Amend, caused Mr. Amend to believe that the drilling costs of Section 2 well had been paid in full. In any event, any direction

or indication as to where this check should be used could be made at or about December 17th.

When this matter was first heard by this Honorable Court, Baker & Taylor's excuse for the application of these funds to the old account of Tri-State was because the costs for the drilling of Section 2 well was not yet due. They knew enough then to apply the balance from the last check ($9,963.37) to the Amend account, although the check was from Tri-State.

Their most recent explanation, when the record showed that their books were confused as to the account numbers of Mr. Amend and Tri-State, was that they considered the two accounts interchangeable.

BULLS' TESTIMONY SUPPORTS AMEND'S TO THE EFFECT THAT HE CALLED AMEND AND ADVISED HIM OF THE RECEIPT OF THREE CHECKS OF $20,000.00 EACH DURING THE MONTH OF DECEMBER, 1962 AND WHILE THE SECTION 2 WELL WAS BEING DRILLED.

Bulls says it was agreed between him and Amend that if either received money from Tri-State they would call the other and advise. (Tr. P. 73, L. 21)

Bulls made one trip to Amend's office before the drilling of the Wilbanks well in an effort to get money on the Nusbaum well. (Tr. P. 74, L. 22 to L. 3, P. 75) Later, Bulls got two $5,000.00 checks from Amend to apply on the Nusbaum well. (Tr. P. 83, L. 11)

> "I think on two occasions checks were received in our office and I called J. D. and told him the checks had been received." (Tr. P. 77, L. 21)

These conversations were by phone. (Tr. P. 78, L. 5) Mr. Amend brought one check for $20,000.00 to the office. These calls were per agreement. (Tr. P. 79, L. 3)

> "I remember, I think calling him on a second check that we received in the mail." (Tr. P. 80, L. 2-3) Bowie told him that the checks were in (Tr. P. 80, L. 14)

Bulls never at any time knew how much money was owing on the Nusbaum well, (Tr. P. 86, L. 6) although after going to Mr. Amend's office before the drilling of the Wilbanks well in December, 1962, he did receive from Amend two $5,000.00 checks on the Nusbaum well. (Tr. P. 83, L. 11)

AMEND UNDER HIS AGREEMENT WITH TRI-STATE TO PAY THIS DRILLING COST FOR AN INTEREST IN THE WELL, HAD A RIGHT TO DIRECT THE PAYMENT OF THE DRILLING COSTS OF THE SECTION 2 WELL WITH TRI-STATE'S CHECKS.

The above is plain from the circumstances of the case. Tri-State or none of its officers were present in Texas and one check for $20,000.00 was mailed to J. D. Amend, who had agreed to sell Tri-State an interest in this well if Tri-State paid the drilling and certain other costs. Although the other two checks were mailed directly to Baker & Taylor, it was at Amend's direction, and it was clear by the amounts of the checks and all the surrounding circumstances the intent of both Tri-State and Amend, and the fact that Baker & Taylor applied the balance of the last $20,000.00 check of Tri-State in payment of a debt of J. D. Amend, shows

that they, too, knew that Tri-State had agreed to pay for the account of Amend the drilling cost on the Wilbanks well. Otherwise, Baker & Taylor would never have applied Tri-State's money to the payment of Amend's debt.

Baker & Taylor's argument in relation to the check which it received and deposited on December 13th, if valid, would not be helpful in support of its contention as to the application of $10,036.63 of the last $20,000.00 check.

At the same time that Baker & Taylor gave Tri-State credit for $10,036.63 on the last $20,000.00 check, it gave J. D. Amend credit for the balance of this check. This alone shows that Baker & Taylor had knowledge that this entire $20,000.00 check was intended for application on the J. D. Amend account, and the Special Master, in effect, so found.

J. D. AMEND DID HAVE A RIGHT TO DIRECT THE APPLICATION OF THE THREE $20,000.00 CHECKS ISSUED BY TRI-STATE.

These three $20,000.00 checks issued by Tri-State Petroleum, Inc., in favor of Baker & Taylor Co. were given to pay an obligation of J. D. Amend, in consideration for which Tri-State was to receive a three-fourths interest in the gas well and lease on Section 2. Since this was a consideration given to Amend for the interest in the gas well and lease, he had the right to direct where the payment should be applied. Since Amend did not know of any indebtedness due Baker & Taylor from Tri-State and Roy Bulls also says he knew of none, they, therefore, could have had under consideration only one obligation upon which to apply

Tri-State's money, and that was the obligation for the drilling of the well on Section 2.

Bulls testified that in the drilling of each of the three wells his dealings and contact were with J. D. Amend; that J. D. Amend looked after the drilling of the well on Section 54 where Tri-State signed the contract.

From this evidence, it appears that J. D. Amend, at times, acted in the capactiy of agent for Tri-State.

ELEMENTS OF ESTOPPEL

Counsel's statement as to the essential elements of estoppel at Page 40 of his brief, which we assume is based upon the law of the State of Tesas, seems to coincide with the California law upon this subject.

Section 1962, Subdivision 3 of the Code of Civil Procedure provides:

> "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;"

In defining estoppel in pais, 18 Cal. Jur. 2d, P. 404, ¶2, says:

> "Estoppel in pais has been defined as a right arising from an act, admission, or conduct which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is asserted. Again, it has been said that estoppel may be defined as a bar by which a person is precluded from denying a fact in con-

sequence of his own previous action which has led another to so conduct himself that if the truth is established the other will suffer. The doctrine of estoppel in pais is well stated in Code of Civil Procedure §1962 subdivision 3, which embraces in its definition of estoppel all the necessary elements. The section provides that when a party, by his own declaration, act, or omission, has intentionally and deliberately led another to believe a particular thing to be true and to act on such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

And in defining the elements of equitable estoppel or estoppel in pais 18 Cal. Jur. 2d P. 406, ¶5, says:

"Among the essentials of equitable estoppel or estoppel in pais are the requirements that there must have been a false representation or a concealment of material facts of the matter as to which estoppel is claimed and that the party to whom the representation was made or from whom the facts were concealed must have been ignorant, actually and permissibly, of the truth. More broadly stated, the essential elements of estoppel are false statements or concealments, or conduct amounting thereto, with reference to the transaction, made by one who has actual or virtual knowledge of the facts to another who is ignorant of the truth, with the intention, resulting in consummation, that the other should act on such false statements or concealments, or equivalent conduct. In other words, four things are essential to the application of the doctrine: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel

has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury."

18 Cal. Jur. 2d, P. 409, ¶10, says:

"A person whose representation or conduct is the basis of a claimed estoppel must have intended that others should act on that representation or conduct, or he must have spoken or acted under such circumstances that others had the right to believe he so intended. While it is often said that the principle of estoppel is invoked to prevent fraud, or that which is tantamount thereto, designed fraud, or actual fraud in a technical sense, is not essential. All that is meant by the expression that an estoppel must possess an element of fraud is that the circumstances and conduct involved would render it fraudulent for a person to deny what he previously induced or suffered another to believe and take action on, no precedent corrupt motive or evil design being necessary."

And 18 Cal. Jur. 2d P. 410, ¶11 says:

"Negligence — that is, careless and culpable conduct — is, as a matter of law, equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel. When a person relies on negligence as the basis of estoppel, he must show that the negligence was the proximate cause of the deceit."

Insofar as we have examined the state law of Texas upon the question of estoppel, we have found little, if any, difference from the California law upon the subject.

THE FACTS OF THE CASE

First: J. D. Amend advised Roy Bulls, the secretary of Baker & Taylor, that Tri-State had agreed to pay the drilling cost on Section 2 for an interest in the well and at the same time, handed Roy Bulls a check issued by Tri-State payable to Baker & Taylor Drilling Co. in the sum of $20,000.00, which was designated for payment on Section 2 well. Mr. Amend at the time told Mr. Bulls that if Tri-State failed to make these payments, that he wanted to be advised, for he could not afford to carry this interest and he had others to whom he could sell same. Mr. Bulls promised to so notify Amend, and in a few days he did notify Amend that the other two $20,000.00 checks had been received, which in every day language is the equivalent of saying that the drilling costs had been paid.

Mr. Amend had instructed Tri-State to send this money for this purpose and the President of Tri-State testified that the three checks were so intended.

Acting upon Mr. Bulls' statement and relying upon the fact that the drilling costs on Section 2 had been paid, Amend made no further effort to sell or dispose of this interest in the well. According to Baker & Taylor's own admission, it mailed no statements of a balance due to either Tri-State or to Amend, and each had a right to assume and they believed that the entire drilling costs on this Section 2 well had been paid, and to the detriment of both Amend and Tri-State.

It works an injustice to Mr. Amend because the money which Mr. Amend was led to believe had been received for the drilling cost on Section 2 was applied for a different purpose. Mr. Amend therefore had no

opportunity to negotiate with another purchaser for this interest or to insist upon Tri-State correcting the situation.

This worked an injustice upon Tri-State because the lien imposed upon the gas well on Section 2 prevented Tri-State from raising the necessary funds to extinguish this lien and get the well on production. If Baker & Taylor had filed a lien upon Section 54 where the Tri-State indebtedness arose, the gas well on Section 2 would have been in operation long ago because an agreement could have been reached with the other creditors to impound the funds.

GENERAL ORDER 47 PROVIDES IN PART THAT: "A SPECIAL MASTER SHALL SET FORTH HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND THE JUDGE SHALL ACCEPT HIS FINDINGS OF FACT UNLESS CLEARLY ERRONEOUS."

The Courts have repeatedly held that they are bound to accept the findings of a Special Master or a Referee unless *clearly erroneous.* A few of the more recent cases in support of this view, which cite other cases, are:

Simon v. Agar, 299 F. 2d 853, which says:

> "It is too well settled to require the citation of authorities that where an appeal brings up for review concurrent findings of fact by the referee and the district court, they can be set aside only if 'clearly erroneous.' See Bankruptcy General Order 47, 11 U.S.C.A. following section 53; Rule 52(a) F.R.Civ.P., 28 U.S.C.A. Particularly is this true where, as in this case, the findings involve questions of credibility of witnesses who testified before the

referee. See *Morris Plan Industrial Bank v. Henderson,* 2 Cir., 131 F.2d 975, 977; *Margolis v. Nazareth Fair Grounds & Farmers Market, Inc.,* 2 Cir., 249 F. 2d 221, 223; *Smith v. United States,* 5 Cir., 287 F. 2d 299, 301. Appellant has not carried his burden of convincing us that both essential findings are clearly erroneous."

Washington v. Houston Lumber Company, 310 F. 2d 881 at 882, says:

"The fact findings of the Refere are binding, both on the district court and on this court, unless clearly erroneous."

In re Berger Steel Company, Inc., 327 F. 2d 401 at 405, says:

"However, whatever impressions we may now derive from our study of the printed record, the Referee saw and heard these witnesses. It is axiomatic that issues of credibility are for the triers of the facts. The findings of fact made by the Referee and by the District Court are entitled to great weight on review. General Orders in Bankruptcy, Nos. 36 and 47; *In re United Wholesalers, Inc.,* 7 Cir., 1960, 274 F. 2d 316, 319; *In re Pringle Engineering & Mfg. Co.,* 7 Cir., 1947, 164 F. 2d 299, 301."

See also:

Solomon v. Northwestern State Bank, 327 F. 2d 720 at 724.

Because of this rule of law, the argument of Baker & Taylor upon the effect of the evidence would have been more appropriate before the trier of the facts who saw

and heard the witnesses and was in a better position to judge the true situation. We made our argument upon these questions before the Special Master and prevailed.

The Special Master not only saw and heard the witnesses, but also took into consideration all the surrounding circumstances and inferences which could reasonably be drawn from the evidence.

The Special Master had before him the law as expressed in 44 Texas Jurisprudence P. 687, and in *Bray v. Crain,* 59 Texas 649, which in effect holds, with reference to the direction of payments upon accounts, that there need not be an expressed agreement, but a tacit understanding of the parties is sufficient, and that their real understanding, however manifested or ascertained is controlling, and that such questions are for the trier of the facts, and may be implied from the circumstances.

APPENDIX NO. 6.

Additional cases upon the question of jurisdiction are the following:

Warder v. Brady, 115 F. 2d 89, at 94, ¶9, which says:

> "It seems clear that the bankruptcy court under Chapter X has jurisdiction to entertain all suits to which its trustee or the debtor in possession is a party, even though they be instituted against adverse claimants."

Where a party to a summary proceeding in a bankruptcy court has the right to object, such right may be waived by consent.

> *MacDonald v. Plymouth County Trust Company,* 286 U. S. 263, 52 S.Ct. 505.

"The fact that the petition did not seek an adjudication but a reorganization in no wise limited the court's jurisdiction of the subject matter and its right to proceed summarily against all but adverse claimants, which attached upon the filing of the petition and its approval."

> *In Re Park Beach Hotel Bldg. Corp.,* 96 F. 2d 886 at 891, ¶(6-7).

The above case is also authority for the Bankruptcy Court's paramount and exclusive jurisdiction, which cannot be affected by proceedings in other courts, whether state or federal. See ¶(1-4), P. 891.

See the case of *Detroit Trust Co. et al. v. Campbell Bell River Timber Co. Ltd., et al.,* 98 F. 2d 389 (9th

CC), where some of the property involved was in British Columbia.

As to the power of the bankruptcy court in Chapter X proceedings over property claimed by the bankrupt, see:

In Re Standard Gas & Electric Co., 119 F.2d 658 at 661, where the Court cites and quotes from the case of *Taubel-Scott-Kitzmiller Company, Inc. v. Fox,* 264 U.S. 426, 44 S.Ct. 396, 68 L.Ed. 770.